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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 325

A. P. HUDSON AND H. ISAIAH SMITH, SPECIAL RECEIVERS OF FIDELITY ASSURANCE ASSOCIATION APPOINTED BY THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, AND FIDELITY ASSURANCE ASSOCIATION, A CORPORATION,

Petitioners,

vs.

~~H. E. GRANT~~, L. H. BROOKS, TRUSTEE, ELBRIDGE W. PAL ~~FREDERICK LEAKE AND A. L. GOLDBERG, JR., TRUSTEE, TENNESSEE RESIDENT CONTRACT HOLDERS OF FIDELITY ASSURANCE ASSOCIATION,~~ AND R. L. MALONEY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE AND BRIEF IN SUPPORT THEREOF.

ARTHUR B. KOONTZ and
PATRICK D. KOONTZ,
J. CAMPBELL PALMER, III,
Counsel for Petitioners.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	3
Jurisdiction	4
Statutes involved	4
Summary statement of matter involved	4
State court proceedings following remand	8
Wisconsin proceedings	10
Tennessee proceedings	11
Proceedings in the Court of Appeals	15
Proceedings in the Supreme Court of Tennessee	19
Further proceedings in Chancery Court	20
Questions presented	22
Reasons relied on for the writ	24
Brief in support of petition	29
Tennessee Proceedings	34
Failure of the Tennessee Courts to Use Due Process of Law Before Depriving Petitioners of Their Property	38
First Federal Question	42
Second Federal Question	47
Grant No Party to Proceedings	48
Grant Did Not Appear for a Class	50
Third Federal Question	52
Fourth Federal Question	58
Supreme Court of Tennessee	60
Conclusion	61

Index to Appendix

Code of West Virginia, Ch. 33, Art. 9, Sec. 3	64
Williams Code of Tennessee, Sec. 6057	65, 66
Amendments to Constitution of the United States, Art. V and Art. XIV	66
Order No. 29, entered by the Circuit Court of Kanawha County, West Virginia, in the case of Edgar B. Sims, Auditor, etc., vs. Fidelity Assurance Association	67
List of Liquidation Cases in Fourteen States Wherein Fidelity Maintained Deposits	68, 69
Proceedings in Chancery Court After Stay Granted by United States Supreme Court	70, 86
Opinion of Trial Court in Wisconsin of February 10, 1945	86, 89

CASES CITED

	Page
Adam v. *Saenger*, 303 U. S. 59, 82 L. Ed. 649	30
Battle v. *National Life and Accident Insurance Co.*, 157 S. W. (2d) 817	44
Beatty v. *Kurtz*, 2 Peters 585, 7 L. Ed. 521	49
Blake v. *McClung*, 172 U. S. 239, 43 L. Ed. 432	56, 58, 59
Brown v. *Brown*, 86 Tenn. 277	49
Brunner v. *York Bridge Co.*, 76 W. Va. 702, 98 S. E. 233	59
Carpenter v. *Ludlum*, 69 F. (2d) 191; certiorari denied, 78 L. Ed. 1028	59
Citizens Bank & Trust Co. v. *Bayless*, 153 Tenn. (26 Thomp.) 40, 281 S. W. 932	44
Collins v. *Welsh*, 75 F. (2d) 894	41
Durham Coal & Iron Co. v. *Bischel*, 4 Tenn. App. 233	43
Ellis v. *Ellis*, 92 Tenn. 471, 22 S. W. 1	43
England v. *Young*, 155 Tenn. 506, 296 S. W. 14	43
Essex Public Road Bd. v. *Skinkle*, 140 U. S. 334, 35 L. Ed. 446, 11 S. Ct. 790	41
Fidelity Assurance Association, et al., v. *Edgar B. Sims*, 318 U. S. 608, 87 L. Ed. 1032	29, 30, 33, 54, 61
Fisher v. *Wineman*, 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 192	42
Gilman v. *Tucker*, 128 N. Y. 190, 28 N. E. 1040, 13 L. R. A. 304	41
In re Fidelity Assurance Association, 247 Wis. 619, 20 N. W. (2d) 638	31
In re Fidelity Assurance Association, 248 Wis. 373, 21 N. W. (2d) 730	32, 52, 53
Hansberry v. *Lee*, 311 U. S. 32, 85 L. Ed. 22	49
Louisville & N. R. Co. v. *Ray*, 124 Tenn. 16, 134 S. W. 858	43
Mayor & Aldermen v. *Love*, 160 Tenn. 177, 22 S. W. (2d) 769	44
Memphis & C. R. Co. v. *Johnson*, 16 Lea (84 Tenn.) 387	43
Nancy v. *Busby*, 91 Tenn. 218	49
Oshkosh Waterworks Co. v. *Oshkosh*, 187 U. S. 437, 47 L. Ed. 249, 23 S. Ct. 234	41
Pacific Spruce Corp. v. *Oregon Portland Cement Co.*, 133 Ore. 223, 286 P. 520, 289 P. 489, 72 A. L. R. 1507	42
Radio Station WOW, Inc., v. *Johnson*, 326 U. S. 120, 89 L. Ed. 2092	46
Rollo, Assignee, v. *Andes Ins. Co.* (Va.), 23 Gratt. 509	57
Shipley v. *Barnett*, 161 Tenn. 437, 32 S. W. (2d) 1022	43
State ex info. McKittrick, Attorney General, et al., v. *Fidelity Assurance Association, et al.* (Mo. 1944), 179 S. W. (2d) 67	31
State ex rel. James v. *Marion Superior Court, etc.* (Ind. 1943), 51 N. E. (2d) 844	31
Sully v. *American Nat. Bank*, 178 U. S. 289, 44 L. Ed. 1072	42, 59
U. S. v. *Knott*, 298 U. S. 544, 80 L. Ed. 1321	58
United States Fidelity & Guaranty Co. v. *Rainey*, 120 Tenn. 357, 113 S. W. 397	51, 54
Wright v. *Dorman*, 155 Tenn. 189, 291 S. W. 1064	43

STATUTES

	Page
Williams Annotated Code of Tennessee, Sec. 9047	42
Sec. 9048	44
Sec. 8829	44
Sec. 1940	47
Sec. 6057	34

MISCELLANEOUS

Insolvency, 14 R. C. L., p. 626	42
Ann. Cas. 1912D, 910	43
1 Clark on Receivers, 2d Ed. 916	48
1 A. L. R. 648	59
92 A. L. R. 590	59
Gibson's Suits in Chancery (Tenn.) Sec. 92, p. 114	49

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 325

A. P. HUDSON AND H. ISAIAH SMITH, SPECIAL RECEIVERS, ETC., ET AL.,

Petitioners,

vs.

H. E. GRANT, ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, A. P. Hudson and H. Isaiah Smith, Special Receivers of Fidelity Assurance Association, appointed as such by the Circuit Court of Kanawha County, West Virginia, respectfully pray that a writ of certiorari issue to review a decree of the Supreme Court of Tennessee entered on March 2, 1946, affirming an order of the Court of Appeals of Tennessee, Middle Section at Nashville. That latter Court, on an appeal taken and allowed several

months after expiration of the statutory time for appeal, by a single contract holder for himself alone, and not as a representative of other similar contract holders, and who was not, and never became, a party to the proceedings, reversed a decree and judgment of the Chancery Court of Davidson County, Tennessee.

The Chancery Court had entered decretal judgments and directed payment of one hundred per cent of cash surrender value, in exact conformity with the terms of contracts issued by Fidelity Assurance Association, to resident contract holders, which judgments became *res adjudicata*, and from which no appeal was ever taken. The payment so ordered was to be made from trust funds deposited with the State Insurance Commissioner, by statutory requirement, while Fidelity was operating in the State, for the benefit and protection of contract holders having cash surrender values under the terms of their contracts. The Chancery Court decree left a surplus of the funds deposited with the state, after payment of all expenses, representing the excess deposit over cash surrender value of such contracts. This fund was properly available to the West Virginia Receivers, petitioners here, for the benefit of contract holders of other states, including the domiciliary State of West Virginia, in which deposits were then inadequate to pay one rundred per cent of cash surrender value upon contracts identical in language ond scope wtih those issued in Tennessee.

The Court of Appeals, sustained by the Supreme Court of Tennessee, on the appeal, reversed the judgment of the Chancery Court, set aside the *res adjudicata* and unappealed from judgments and determined and directed that the entire fund on deposit in Tennessee be distributed promptly to residents of Tennessee on the basis of the higher cash surrender value of the contract, or the total amount paid in by the contract holder, all as damages for

the breach of contract resulting from insolvency. Upon this new basis of payment, Tennessee claimants could receive payment for only approximately 70% of their judgments, and the surplus belonging to these petitioners is wiped out.

It is likewise directed that distribution on this basis should be made alike to those who had contracts with cash surrender values and those who, by the terms of their contracts, had no cash surrender value. The latter, by the conditions under which the trust fund was created, had no interest in the fund and by the terms of their contracts had no right to participate in the proceeds of the fund. Likewise, all contract holders with cash surrender values who had been awarded final and conclusive judgments for the full amount of cash surrender value, and who were not parties to the appeal, lost the benefit of these judgments. Many hundreds of such contract holders suffered losses by this procedure, of at least 30% of their judgments decreed by the Chancery Court. Contract holders in other states, claiming through the receivers, appellants here, likewise lost rights fixed by the terms of their contracts to the extent of the surplus made available to them by the judgment of the Chancery Court. An order staying the provision of the decree of the Supreme Court of Tennessee was entered by Mr. Justice Stanley Reed, of this Court, and additional time within which to file this petition was granted by the same Justice (R. 186).

Opinions Below

The three written opinions of the Court of Appeals and the three written opinions of the Supreme Court of Tennessee, by orders of those Courts, remain unprinted, and hence are a part of the record of this case (R. 96, 98, 135, 161, 180).

The case was entitled below, L. H. Brooks, Trustee, et al., *vs.* Fidelity Assurance Association, et al.

The opinion of the Chancery Court is also unprinted, and is a part of the record of this case (R. 52).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a), Judicial Code, as amended by the Act of February 13, 1925 (Sec. 28, U. S. C. A. ~~347~~ 344).

The final decree of the Supreme Court of Tennessee was entered on the 2nd day of March, 1946, denying the second petition for rehearing, filed by these and other petitioners, with permsision of that Court (R. 179).

Statutes Involved

The issues involve the construction and application of Section 3, Article 9, Chapter 33, of Michie's Code of West Virginia, 1941, and the provisions of Section 6057, Tennessee Code, as amended by Chapter 209, Acts of 1939, Tennessee Legislature, the pertinent provisions of each of which are printed in Appendix I hereof; also involved are the Fifth and Fourteenth Amendments to the Constitution of the United States.

Summary Statement of Matter Involved

The material facts are presented in some detail in the opinion of the Chancery Court (R. 52-59), and in the final opinion of the Court of Appeals (R. 98-102), and the Supreme Court of Tennessee relied in most part upon the facts as stated by the courts below. Condensed for the purposes of this petition, the facts of the case and the nature of the proceedings are as follows:

The instant case is an outgrowth of the remand of the case of *Fidelity Assurance Association* v. *Sims*, 318 U. S. 608, 87 L. Ed. 1032, and many of the facts herein involved were specifically set forth by Mr. Justice Roberts in that opinion.

It is necessary briefly to review those facts in order to fully understand the instant case. As there stated, Fidelity Assurance Association sold annuity contracts under the supervision of the Auditor of West Virginia, and therefore became subject to the provisions of Article 9, Chapter 33 of the Code of West Virginia (318 U. S. p. 611).

In general, the contracts sold "consisted of certificates evidencing the agreement of the purchaser to make specified periodic payments and the company's agreement that upon the expiration of a stipulated term it would return to him in instalments a sum designated as the face amount, or pay a lump sum less than the face amount. • • • the business was essentially the conduct of a compulsory savings plan. The interest paid a certificate holder was at a low rate and the penalty for failure to keep a certificate alive was heavy. • • • (P. 611).

"• • • It was his (Auditor's) duty to require and approve the deposit with the State Treasurer of bonds and securities to be held in trust for the benefit of the company's West Virginia contract holders to an amount equal to the cash liability to them; to require a similar deposit in trust for the benefit of holders located in other states to the extent that the laws of such states did not provide for a deposit equal to, or greater than, that called for by the laws of West Virginia. Shortly after taking office, the Commissioner discovered that the company was insolvent."[1] (P. 611, 612.)

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[1] In the Series B Contracts, which involved substantially all Tennessee contract holders, Fidelity agreed to set aside certain reserves from payments made, which were to "be invested in approved securities and deposited in trust as required by the laws of West Virginia." 318 U. S. 612. Stt also, Sec. I, Series B Contract (R. 13).

The opinion by Mr. Justice Roberts further found as facts:

> " • • • fifteen (states) required a deposit of approved investment obligations with some state official to secure payment of outstanding contracts held by residents; the remainder had no such requirement, but the contracts sold in these states were secured by the deposit made with West Virginia." (P. 612.)

As the opinion further states:

> "At the instance of the Insurance Commissioner (Auditor), the Attorney General of West Virginia, on April 11, 1941, instituted proceedings for the appointment of a receiver in the Circuit Court of Kanawha County. • • • Thereafter proceedings were instituted or steps taken by state officers, pursuant to state law, for the liquidation of the company's obligations to local certificate holders in Wisconsin, Iowa, Ohio, Illinois, Tennessee, Missouri, Indiana, Kentucky, Maryland and Pennsylvania." (P. 614-15.)

Fidelity, on June 6, 1941, had filed a petition for reorganization, under Chapter X of the Bankruptcy Act, and the jurisdiction of the District Court to entertain the petition was challenged by state banking and insurance commissioners and state court receivers. (P. 610).

An appeal to the United States Circuit Court of Appeals for the Fourth Circuit followed the sustaining by the District Court of its jurisdiction, and a reversal was there made which this Court affirmed in the above mentioned case, and the matter was thereupon returned to the various state courts for further proceedings.[2]

One of those state courts was the Chancery Court of Davidson County, Tennessee, where, on the *21st* day of

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[2] See, *Simms, et al.*, vs. *Fidelity, et al.*, 129 F. (2d) 442, and *In re Fidelity*, 42 F. Supp. 973 (S. D. W. Va.).

April, 1941, several cash surrender value contract holders [2a] instituted a creditors suit for the purpose of segregating the deposit of securities formerly made in that state by Fidelity for the benefit of the resident cash surrender value contract holders, and the instant questions arose by reason of the attempt of the courts of Tennessee to decide the basis of distribution of the deposited assets among the various contract holders of Tennessee, and the question of whether the surplus of deposit in Tennessee should be returned to the West Virginia Receivers in accordance with the prior holding of this Court (P. 619), wherein it was stated:

> "On the other hand, a surplus in a state fund after satisfaction of local creditors, will be added to the surplus fund in West Virginia for the benefit of all having claims against it." (P. 619.)

Further facts necessary to understand the instant case include the fact that in each contract a cash surrender value table was set up as a part thereof, in which cash benefits increased monthly after payments were made, but no cash surrender value was available to the contract holder until twelve full monthly payments had been made.

It was the total of the current cash surrender value of all contracts, as of the time of the making of the deposit, which was required by the West Virginia and other state statutes, and such cash surrender value was the amount protected by such trust deposit.

As explained in the above opinion, the cash surrender value, because of selling and other expenses during the early years of the contract (P. 611), was substantially less than the total of the monthly amounts paid in by contract holders, but after payments had been made from seven to

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[2a] Those contract holders were L. H. Brooks, Trustee, Frederick Leake and A. L. Goldberg, Jr., Trustee, named as respondents herein.

nine years, the cash surrender value increased so as to equal the total amount paid in, and from then on exceed it.

State Court Proceedings Following Remand

When the fifteen various depositary state courts were again permitted to resume their proceedings for the liquidation and distribution of their deposits of Fidelity assets, on or about June 1, 1943, each court proceeded about its business separately, with, however, the West Virginia receivers acting as coordinators of the fifteen proceedings, and in the nature of *parens patriae* for all of the contract holders throughout the United States.

By Order No. 29, entered on the 14th day of September, 1943, by the Circuit Court of Kanawha County (Appendix 67), the West Virginia Receivers were specifically authorized to enter, as parties, into each of the other state court proceedings for the purpose of aiding therein, and for the further purpose of minimizing claims over against the West Virginia deposit, and collecting and receiving any surpluses existing in any states over the requirements of their contract holders.

Following such order, the West Virginia Receivers, on October 25, 1943, with the permission of the Chancery Court of Davidson County, Tennessee, filed their proper answer in the Chancery Court and became parties thereto (R. 19, 45).

Briefly, in all proceedings other than Tennessee, hearings were had and interpretations of the depositary statutes and agreements were made by the respective courts, after notice to every interested contract holder or his attorney. In each and every instance, the courts, after mature consideration, decided that, the deposit having been made in trust for the benefit of those resident contract holders who had net cash surrender values to their contracts, and in the amounts of such net cash surrender values, they were entitled to receive 100% of the net cash surrender value of their claims as of

April 11, 1941, but without interest thereon, and had a preferred lien on the deposited trust funds for the payment of such claims;[3] and that any balances remaining thereafter, after payment of proper costs and expenses, were returnable to the West Virginia Receivers to become and remain a part of the West Virginia deposit trust fund, which had been turned over by the West Virginia Treasurer and Auditor to the West Virginia Receivers by proper decree of the Circuit Court of Kanawha County.[4]

Those proceedings were, with the exceptions which will be herein mentioned, had solely in trial, circuit or district courts—that is, lower courts—from which no appeals ever were taken. A list of such proceedings is contained in Appendix 68.

As will be disclosed by the records of those proceedings, Alabama returned $2,632.33 to the West Virginia Receivers; Illinois returned $293,653.95; Indiana returned $25,270.49; Ohio returned $264,606.28; Missouri returned $140,727.45; Kansas returned $10,472.29; Iowa returned approximately $1,000.00; and Wisconsin has returned approximately $310,000.00, all as surplus assets in their deposited funds, over and above amounts needed to pay their resident contract holders, protected by the deposit fund, 100% of the cash surrender values of their contracts, and the expenses of the proceedings.[5]

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[3] This was in accord with the opinion of this Court "that there is one greatly predominate class of creditors—certificate holders—all having security for their claims on one or more deposits with state authorities * * *." (P. 617).

[4] See, P. 318 U. S. 619.

[5] The above amounts turned over were gross, and in several instances amounts for unlocated contract holders, and amounts for uncashed checks, were included. Ohio, by written agreement with the West Virginia Receivers, approved by the respective courts, kept the above surplus over the amounts needed to pay one statutory protected group 100% of cash surrender value, to pay an unprotected group of cash surrender value contract holders a 15% dividend, instead of turning the amount over to the West Virginia Receivers to pay such dividend.

Wisconsin Proceedings

In Wisconsin there was a contest between the Auditor of West Virginia and the West Virginia Receivers, on the one hand, and the Banking Commission of Wisconsin, acting as a statutory equity receiver, on the other hand, the Banking Commission contending, first, that Wisconsin resident contract holders should be paid, from the deposit made in Wisconsin, on the basis of amount paid by contract holders to Fidelity, with interest from payment to date of receivership, as damages for breach of contract; the Receivers contending the basis of distribution should be on the same basis on which the deposit was made, namely, the net cash surrender value of the contracts.

The Banking Commission contended that even if the West Virginia Receivers were correct in their contention, that interest should be paid the Wisconsin contract holders as preferred claimants before the surplus of the deposit fund should be returned to West Virginia, there to be used to complete 100% of net cash surrender value payments to all contract holders throughout the United States. In the two cases of *In re Fidelity, 247* Wis. *619,* 20 N. W. (2d) 638, and *248* Wis. *373,* 21 N. W. (2d) 730, the Supreme Court of Wisconsin sustained the contention of these present petitioners, the West Virginia Receivers, and the surplus has since been returned to West Virginia.

In Illinois, the deposit statute was substantially identical with the 1939 amendment to the Tennessee statute under which the deposit in Tennessee was made, and was apparently used by the Tennessee Legislature as a guide for its statute.

Yet in Illinois, in the case of *Edward J. Hughes, as Secretary of State of the State of Illinois,* vs. *Fidelity Assurance Association, a corporation,* the Circuit Court of Sangamon County, with more than $4,500,000.00 on

deposit and 6,000 contract holders involved, several years prior to the Wisconsin decision, decided in favor of the West Virginia Receivers and returned approximately $300,000.00 to them, with no contract holder objecting or appealing.

Tennessee Proceedings

The statutes of Tennessee,[6] effective in 1939, required Fidelity to maintain a deposit, in trust, with the Insurance Commissioner of Tennessee, of approved securities, "at no time less than 100% of issuer's cash or current contract liability," and thereafter Fidelity did maintain a deposit of at least 100% of the aggregate net cash surrender values of all Tennessee contracts. Since many contract holders in Tennessee had purchased their contracts before the effective date of the statute, the deposit theretofore made in West Virginia for the benefit of such contract holders, was discontinued, and the funds necessary for their protection were transferred to and deposited as required in Tennessee, in trust, and from time to time additional deposits were made as new or higher cash surrender values were created by reason of further payments by Tennessee contract holders.

After the filing of the creditors' bill, the Court impounded the funds, and by its decree of April 24, 1941 (R. 23-26), set forth how persons affected thereby, or who had an interest therein, could become parties to the proceeding, by filing their proper petition.

On May 7, 1943, the Chancery Court of Davidson County, Tennessee, caused notices to be sent to all Tennessee contract holders to file their proper proofs of claim, together with their contracts (R. 39), and further gave notice to all Tennessee contract holders of a hearing to be had, at

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[6] See Appendix 65 for pertinent parts of statute, being Sec. 6057, Tennessee Code, as amended by Ch. 209 of the Acts of 1939.

which time all of the legal questions involved in the distribution of the deposited assets would be presented to the Court for its determination.

These petitioners, the West Virginia Receivers, on October 25, 1943, with the permission of the Chancery Court of Davidson County, Tennessee, filed their proper answer in the Chancery Court and became parties thereto (R. 19, 45).

A hearing was had on October 25, 1943, with many contract holders being there represented by counsel, and thereafter the Chancery Court filed its written opinion (R. 52) sustaining the contentions advocated by the West Virginia Receivers,—that is, that the deposit trust fund should be distributed to those contract holders for whose benefit it had been created, the cash surrender value contract holders,—and on December 10, 1943, without objection or exception by any person, entered its final decree based upon that opinion (See Decree, Part 3). (R. 51).

In round numbers, the deposit fund, after liquidation, amounted to $236,000.00. There was $36,000.00 of expenses and $185,000.00 of net cash surrender value claims, leaving a surplus of $15,000.00 to which the West Virginia Receivers were entitled. (Opinion Court of Appeals, p. 6, 7, R. 102). The total amount paid in by Tennecsee contract holders was $265,000.44 (R. 100).

The decree of the Chancery Court (see Part 4 thereof) (R. 51), referred the matter to its Clerk and Master, as Special Commissioner, to make the necessary mathematical calculations for payment of the individual claims allowed, several reports of the individual persons to whom the fund was payable having previously been made and approved (R. 51).

The thirty days during which any person could appeal from this final order under Tennessee law passed.[1]

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[1] See brief for full discussion of this point.

No one appeared before the Master, but when the Master's report was presented to the Court setting forth the exact amounts payable to those awarded judgments by the final decree of December 10, 1943, and making no allowance to those not permitted by the decree to share in the distribution of the deposit fund, then for the first time in the entire proceedings H. E. Grant, respondent herein, by his attorneys, appeared and objected to the report, on the ground that Grant had not been allowed his claim.[8]

He had not filed a copy of his contracts, claiming they were lost; but he had filed a proof of claim, on a printed form mailed to him, in which, without stating the date when he purchased his contracts, he did state that he had made seven monthly payments of $15.00 each, a total of $210.00, on which there was no cash surrender value. (R. 41-43).

The Master overruled the exceptions of Grant, who then excepted to the confirmation by the Court of the report, again on the ground that he had not been allowed his claim,[9] and then appealed to the Court of Appeals.

Grant never at any time filed any pleading in the case, or made any request to become a party to the case, nor complied with the Court's decree of April 24, 1941, requiring the filing of a petition in order to become a party to the case; never served any notice of his objections, exceptions

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[8] The exact language used in this exception is of great importance in this case, and hence is here quoted: "H. E. Grant, holder of two Series B contracts, Nos. S-24083 and S-24084, hereby excepts to the report filed by the Clerk and Master on the 29th day of January, 1944, in so far as said report failed to recognize his rights to participate in the impounded fund."

[9] The exact language is again quoted: "H. E. Grant, holder of two Series B Contracts, Nos. S-24083 and S-24084, excepts to the decree rendered in this cause on December 10, 1943, Book 153, page 476, in so far as the decree denies him the right to participate in the distribution of the impounded fund. * * *"

or appeals on the West Virginia Receivers, who were parties defendant to the case, made no service, gave no notice to the hundreds of contract holders who had been awarded judgments by the decree of December 10, 1943, and, in brief, acted and purported to act solely as a creditor dissatisfied with his own disallowance of claim, and in no way or manner made any move as a party to the case; nor at any time prior to perfecting his appeal did he ever appear, or state or claim that he was representing any person or persons other than himself.

Other than the opinion of the Chancery Court, which was based on facts orally stated and agreed to at the hearing on October 25, 1943, the only direct evidence in the case as to how the deposit trust fund was created in Tennessee and for whose benefit, is found in the affidavit of H. Isaiah Smith, one of the petitioners, and a West Virginia Receiver (R. 136 below), wherein he stated:

> "No deposit was made in Tennessee or any other state until the contract in question had achieved a cash surrender value; and accordingly, those accounts which show no value but do have a small reserve value were not actually protected by a deposit in your state (Tennessee)."

However, the original petitioners who instituted the Tennessee proceedings, stated in their petition of May 7, 1943, to which no objection was ever made:

> "It appears that the deposit of securities in the State of Tennessee was made according to the cash surrender value on all outstanding contracts held by contract holders who, according to the records of the company, were residents of the State of Tennessee."

Those same petitioners, in their original bill beginning the suit, prayed that they be "allowed to file their bill on behalf of themselves and all other contract holders of the

defendant corporation who are residents of the State of Tennessee * * *."

Proceedings in the Court of Appeals

After the appeal was filed, contract holders who had instituted the original proceedings, and who are now represented by the West Virginia Receivers as petitioners here (as will appear from their brief filed in their behalf in support of this petition), and whose interests have been joint ever since the decree of the Chancery Court on December 10, 1943, moved the Court of Appeals to allow Grant a judgment for the full amount claimed with interest and costs, and then to dismiss the appeal (R. 71-74).[10]

Eighteen attorneys for a large number of contract holders filed a separate motion to dismiss the appeal (R-76-78).

The West Virginia Receivers, with the contract holders joining, then requested permission to, and did, deposit $210.00 to be held for Grant, if he had any rights, and moved for distribution of the deposit fund.[11]

Grant resisted all motions, and was sustained by the Court of Appeals.

As shown by the opinion of the Court of Appeals, claims for amount paid in could approximate $265,000.00, and therefore each claimant, whether of cash surrender value or amount paid in, could receive from the $200,000.00 balance of deposited assets, after expenses, not more than 75 cents on the dollar. However, there were claims filed within the time set by the Court, and at the time of

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[10] This was because the appeal was holding up the distribution of the $185,000.00, and was the quickest and cheapest way to dispose of it, but the motion did not acknowledge any rights in Grant.

[11] This was the full amount Grant claimed he had paid in, and which he could recover under any theory.

appeal, of only $7500.00 for amounts paid in where there was no cash surrender value. (R 45-48).[12]

Thus, the older contract holders, whose cash surrender values exceeded their amounts paid in, would suffer a loss of at least 25 cents on the dollar under the basis of distribution of amount paid in or cash surrender value, whichever was the higher, by a reopening of the case to let in all claimants who had not filed when the case was terminated in the Chancery Court, and by a cancellation of their awarded judgments to those older contract holders.

There was then raised the question before the Court of Appeals, which was again raised upon final argument in that Court (see Motion August 23, p. 3, R. 84, 85), that Grant had excepted on behalf of himself alone; that he had never become a party to the proceedings below or filed any pleadings there by way of answer or intervention whereby he claimed to appear for a class, and that therefore the sole issue, if any, was whether Grant alone was entitled to recover, and his appeal could in no way affect the *res adjudicata* judgments rendered on the claims of the other 529 contract holders.

The Court of Appeals, at the time the question was raised and again in its final opinion, held that Grant represented all others of the class of persons of which he was one, and was entitled to appear in their behalf, whether they had filed claims or not.

The West Virginia Receivers, who never received legal notice of Grant's belated appearance until his appeal had been perfected, and who because of Grant's last-minute appearance in the court below, had not had an opportunity

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[12] Therefore, there being $185,000.00 of cash surrender value claims, and only $7500.00 of amount paid in claims filed at the time the decree for final distribution was entered, these could all have been paid in full from the $200,000.00 fund, and left $7500.00 for the West Virginia Receivers, and the appeal was unnecessary.

to present evidence against his claim, and had not needed to do so earlier because it had been disallowed under the Chancery Court's decree of December 10, 1943, filed an affidavit in the Court of Appeals showing that by the books and records of Fidelity, Grant had breached his contract prior to receivership, by failing to make the agreed and required payments, and had thus become delinquent, and that under his own theory of being allowed to recover damages for breach of contract, he would have no legal claim because he had committed the first breach, and that therefore he could have no right to appeal under any circumstances.

A motion was made to remand the case to develop these and other facts, if it became necessary, and the affidavit was attached thereto. This motion was refused, and the Court ordered the affidavit stricken from the record as improperly filed (R. 85, 94, 96).

On final hearing, the Court of Appeals held that each contract holder of Tennessee, whether he had filed a claim or not, who was not more than a year delinquent in his payments, and who had not achieved a cash surrender value by making his twelve monthly payments, should, together with the contract holders with net cash surrender values, be entitled to share equally in the fund, on the theory that the company had breached its contract with each of the contract holders, and that the amount so allowed to be recovered was the damages to which each contract holder was entitled for that breach, and remanded the case solely to determine the amounts to be paid such persons.

The appellants, on final hearing, had contended that Grant's appeal, under Tennessee law, was filed too late, and that he could not appear for a class, under Tennessee law, but for himself alone, and that the statutes and decisions were so positive in both these regards, that to decide other-

wise would be an arbitrary decision by the Court, amounting to a disregard of the law. Appellants' contentions were adversely determined by the Court of Appeals.

The West Virginia Receivers and the Tennessee contract holders who were interested with them, raised the further contentions that each Tennessee contract holder had been by the court below awarded a judgment from which there had been no appeal, no notice of appeal, and which had become *res adjudicata* as to each contract holder; that the appeal by Grant could not set aside those *res adjudicata* judgments in favor of each of the older contract holders and give them a new judgment of 25% less, without depriving them of their property without due process of law, nor could the Court set aside the judgments allowing the contract holders without cash surrender values nothing, and summarily award them new judgments of substantial amounts of money, and in so doing thus deprive the West Virginia Receivers of the $15,000.00 surplus to which they were entitled, without depriving the Receivers of their property without due process of law. This was likewise rejected by the Court of Appeals.

Finally, the West Virginia Receivers, contending that the deposits had been made in trust in Tennessee for the sole benefit of contract holders with cash surrender values,[13] that the Court had no right to set aside their trust liens on the assets and to allow payments to be made on judgments which were in the nature of general claims, and that if the fund were merely to be held answerable for claims for damages for breach of contract, the Court had taken away the trust features of the fund and made it, in substance, general assets, and therefore the Tennessee contract holders could not receive a higher amount therefrom than could general

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[13] And it was contended that this Court had so held in *Fidelity* v. *Sims*, *supra*, as it in fact had (supra p. 4, 318 U. S. at 617 and 618).

creditors throughout the United States, without a violation of the federal rights of the latter.[14] All of these contentions were rejected by the Court of Appeals, and it ordered the Chancery Court to make distribution promptly upon the basis of amount paid in or cash surrender value, whichever was the higher, which would give each person approximately 75% of his newly allowed claim.

Proceedings in the Supreme Court of Tennessee

Certiorari was allowed by the Supreme Court of Tennessee on the petition of the older Tennessee contract holders and these instant petitioners, and the same questions were there raised, and the same answers given, as had the Court of Appeals, and its opinion was affirmed.[15]

On motion for rehearing, the Tennessee cash surrender value contract holders raised the question that the Supreme Court's interpretation of the depositary statute impaired their contractual rights, in that their written contracts had a provision requiring a deposit to be made by the company in accordance with the laws of West Virginia, by which the company agreed to deposit the net cash surrender value of each contract, for the benefit of such contract holder, in trust, in accordance with the laws of West Virginia, and that the company had so done; that with the enactment of the Tennessee statute, these funds were transferred to Tennessee, as permitted by the laws of West Virginia, and so held there in trust; that for the Court now to interpret the statute to allow this property to be taken from such

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[14] The Chancery Court recognized this very danger and discussed it in its opinion (R. 58).

[15] The various above mentioned contentions were raised first in the Chancery Court, then in the Court of Appeals, then in the Supreme Court, and in two petitions for rehearing there, and are found throughout the record.

persons and given to other persons impaired the obligation of their contracts.

The West Virginia Receivers, on their motion for rehearing, raised in particular the questions which have been stated above as having been raised in the Court of Appeals. (R. 141-155, 157). In another written opinion (R. 161, 162), the Supreme Court of Tennessee overruled the contentions, particularly those of the contract holders, and awarded a stay of judgment for ninety days pending application to this Court for writ of certiorari (R. 162).

On a second motion for rehearing filed by the several parties, with permission of that Court, the Court entered a further written opinion withdrawing the awarding of the stay, withdrawing its second opinion entirely, and ordered the Chancery Court forthwith to carry out the distribution which it had ordered by affirming the judgment of the Court of Appeals (R. 180).

Further Proceedings in Chancery Court

So that there can be no doubt as to the finality of the decision and decree of the Supreme Court of Tennessee, even though it remanded the cause to the Chancery Court, we hereinafter set out the proceedings that have since occurred in the Chancery Court,[16] and do not do this for any purpose of having this Court review such further proceedings.

Immediately after the entry of the last opinion of the Supreme Court of Tennessee on March 2, 1946, a motion was made by counsel for Grant on or before March 6, 1946, on the motion docket of the Chancery Court, to be heard on March 8, 1946, in which Grant moved the Chancery Court to make the judgment of the Supreme Court the judgment

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[16] See Appendix 70-86.

of the Chancery Court, and for an order of reference in accordance therewith.

A petition for payment of attorneys' fees on account was likewise filed.

Being advised by the Chancery Court that it believed it was compelled by the decree of the Supreme Court of Tennessee to grant the motion made, and compelled to refer the matter to the Master merely for the purpose of making the needed mathematical calculations as to who should be paid, the Receivers, petitioners herein, applied for and obtained a stay of the proceedings from Mr. Justice Stanley F. Reed of this Court, after proper notice to Grant's counsel, who appeared.

That stay, however, permitted the payment of a minimum of 50% of net cash surrender values to all residents of Tennessee who had such claims, as all counsel agreed they would receive at least that amount no matter how the controversy terminated, permitted payment of certain incurred expenses, and permitted the Court to use its discretion as to attorneys' fees.

When the stay was presented to the Chancery Court, it allowed such payment of 50% of the net cash surrender value of claims paid, the expenses permitted to be paid under the stay order, took the matter of counsel fees under advisement, and entered its decree to the effect that it had stayed the reference requested solely because of the stay granted. [17]

In other words, the Chancery Court stated that were it not for the stay, it would promptly carry out the decree of the Supreme Court ordering forthwith payments made to

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[17] The exact language of the decree of the Chancery Court was: "The motion of H. E. Grant for the order of reference pursuant to the decree of the Supreme Court of this State is for the present denied because of the granting of the stay by a Justice of the Supreme Court of the United States of further proceedings pending a decision of the Supreme Court."

the contract holders which that Court had held were entitled to participate in the distribution of the deposited assets, and referring the matter to its Master solely to make the necessary mathematical calculations as to such claims.

Answers were filed by petitioners herein to the petition for attorneys' fees on account, setting up that until final determination of this controversy by this Court, it would be impossible to ascertain if Grant's counsel had benefited the estate, or even a class of claimants, or had merely been engaged in work solely on behalf of Grant himself; that in their opinion his counsel represented only a claimant with a $210.00 claim; that in any event, the class to which Grant belonged and purported to represent, had filed claims for less than $7,500.00 within the permitted time, and at the time of Grant's first appeal.

The Court, by decree of April 11, 1946, allowed counsel, on account, $3,000.00, from which decision petitioners were refused an appeal in Tennessee, on the ground that no final action had been taken from which an appeal would lie.

Questions Presented

1. Are not appellate courts without jurisdiction and acting unconstitutionally and without due process of law when they allow an appeal to a person who is not a party to a proceeding, after the statutory time for appeal has passed, and upon such appeal decide and determine the rights of proper parties to the proceedings?

2. Where an appellate court, upon the appeal of one creditor on his own behalf alone, sets aside judgments entered in the court below in favor of other creditors, and parties to the suit, which judgments became *res adjudicata* and were unappealed from, and reduces the amounts of such judgments of such creditors and renders new judgments in favor of other creditors who neither appealed nor were

parties to the proceedings below, does not such court act unconstitutionally and without due process of law and deprive the judgment creditors of their property unlawfully?

3. And when such courts unlawfully creating such new judgments as above stated thereby deprive domiciliary receivers of the surplus of a fund over and above that needed to pay in full all *res adjudicata* judgments of creditors in the ancillary proceedings, together with the expenses thereof, does such court not unconstitutionally deprive such receivers of their property without due process of law and deny them equal protection under the law?

4. Where deposits have been made in a state, in trust for the benefit of a certain special group of creditors to whom a company was obligated by its contracts and by statute to maintain at all times a sufficient fund of assets to protect the current amounts of cash it owed such creditors, may the courts of the state wherein the deposit was made, upon the insolvency of the company, set aside the trust lien required by such creditors upon such deposit fund and the lien of the domiciliary receivers to the surplus of the fund and hold the fund open to all local creditors as damages for breach of contract, when the fund was insufficient to pay all of such latter creditors, without depriving the protected creditors and the receivers of their property without due process of law?

5. In any event, can such court hold such deposit fund being answerable as damages for breach of contract must be paid solely to resident creditors who will thereby receive higher dividends than identical non-resident creditors looking for similar payments to the domiciliary receivership, and even deprive the domiciliary receivership of proving that some resident creditors committed a prior breach of contract to defeat or mitigate their claims for damages,

without violation of the Fourteenth Amendment to the Constitution of the United States requiring equal protection under the law for all persons?

Reasons Relied On for the Writ

(1) The Court of Appeals, affirmed by the Supreme Court, allowed the appeal of Grant, who was not and never became a party to the suit below, and who served no process upon the other parties to the suit, and allowed that appeal several months after the statutory time for appeal had expired and the final decree settling and adjudicating all rights and interest in the deposit trust fund had been entered, in direct violation of the statutes and of all Tennessee decided cases thereon.

(2) Contract holders with cash surrender values received decretal judgments in the Chancery Court for 100% of their claims for cash surrender values, to be paid from the deposit trust fund, which judgments became *res adjudicata*, and no person appealed therefrom; the Court, in allowing Grant to appeal solely on behalf of his own interests, set aside these *res adjudicata* judgments and decreed such persons should receive and be paid a judgment for at least 25% less.

(3) Those contract holders without cash surrender values to their contracts had decretal judgments entered giving them nothing for their claims against the deposit trust fund, which judgments became *res adjudicata* and were unappealed from. On the appeal of Grant alone, and solely for his own benefit, the Court of Appeals, sustained by the Supreme Court, held that such judgments could be reopened, and awarded such persons, even those who had never filed a claim, judgments for substantial sums of money, to be paid from the deposit trust fund.

(4) The surplus of $15,000.00 remaining after payment of all costs and expenses, and all judgment claims of cash

surrender value contract holders, rightfully belonged to the West Virginia Receivers, and by reopening the *res adjudicata* judgments mentioned immediately above and awarding such persons new and substantial money judgments, the Court wiped out this surplus.

(5) When these petitioners, on respondent Grant's appeal solely in behalf of his own interest, deposited a sum sufficient to pay respondent's entire claim, and moved that he be awarded judgment for such amount, the Court should have granted that motion, in accordance with Tennessee statutes and practices.

(6) The deposits in Tennessee were made in trust for the benefit of cash surrender value contract holders only, and this Court so held in *Fidelity* vs. *Sims, supra,* and further held that the liens acquired thereon by such persons could not be disturbed.

The Court of Appeals, sustained by the Supreme Court, nevertheless arbitrarily set aside such trust liens and decreed that these trust funds be paid to contract holders for whose benefit no deposit had been made.

(7) The Court of Appeals, sustained by the Supreme Court of Tennessee, in doing the acts related in the six points above, acted without due process of law, and deprived these petitioners and others represented by them of their property thereby.

(8) The decision of the Supreme Court of Tennessee resulted in the trust character of the fund being dissolved, as it directly held it should be used for the benefit of creditors who had claims for damages and breach of contract; in other words, general claimants, and the fund thereby being general assets.

To allow such resident general claimants to receive all of the fund and thus be paid a far higher dividend than would

other similar claimants from the domiciliary receivership in West Virginia, denies such non-resident creditors equal protection under the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(9) The Court of Appeals, sustained by the Supreme Court, ordered judgments entered by the Chancery Court, upon remand, for each Tennessee contract holder with damages for breach of contract, and refused to allow the West Virginia Receivers to prove that many such contract holders, including respondent Grant, committed the first breach of contract, and thereby were either entitled to no damages or a substantially lesser amount, and thus deprived the West Virginia Receivers of the opportunity of making any defense against such claims, in violation of their constitutional rights.

(10) The surplus of $15,000.00, belonging to the West Virginia Receivers, would be held by them in trust, together with other similar assets, for the benefit of approximately 50,000 contract holders scattered throughout the United States and its territories, and the taking away of that sum from the West Virginia Receivers is a matter of public interest to the contract holders in the other fourteen depositary states outside of Tennessee, as well as the many contract holders in the non-depositary state.

(11) On substantially similar depositary statutes, fourteen depositary states, severally, through their courts, determined upon a basis of distribution for deposited trust assets which the Supreme Court of Tennessee has decided is inapplicable, and the latter decided upon a basis of distribution directly rejected by the other fourteen state courts. It is a matter of public interest that a receivership scattered throughout fifteen states, under substantially similar depositary laws, and involving citizens and residents of every

state, should have an equal and uniform distribution, particularly where the matter has been before this Court at an earlier date, and the principles of distribution were substantially agreed upon by the parties and approved and affirmed by this Court.

(12) It is a matter of public interest in equitable receiverships that where 50,000 contract holders scattered throughout the United States, and the courts in which they had appeared are all agreed upon one interpretation of depositary statutes, that one contract holder in one state appealed on behalf of himself alone, and solely for his own interest, should not be allowed to disrupt the entire equitable principles of that receivership, to the detriment of all of the other persons interested therein.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of, and under the seal of this Honorable Court, directed to the Supreme Court of Tennessee, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all of the proceedings in the case entitled "*L. H. Brooks, Trustee, et al.*, vs. *Fidelity Assurance Association, et al.*, Davidson Equity, No.——," and that the judgment of the Supreme Court of Tennessee may be reversed and the decision of the Chancery Court affirmed, and that your petitioners may have such other and further relief in the premises as to this Court may seem proper.

A. P. Hudson and H. Isaiah Smith,
Special Receivers, etc., Petitioners,

By: Arthur B. Koontz and Patrick D. Koontz,

J. Campbell Palmer, III.
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 325

A. P. HUDSON AND H. ISAIAH SMITH, SPECIAL RECEIVERS, ETC., ET AL.,

Petitioners,

vs.

H. E. GRANT, ET AL.

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief will be somewhat in the nature of a report by petitioners to this Court, and as their story is told, petitioners will request certain relief from the Court and show how and why they are entitled to it.

In the case of *Fidelity Assurance Association, et al.*, v. *Edgar B. Sims*, 318 U. S. 608, 87 L. Ed. 1032, this Court, undoubtedly with some misgivings, decided, not only as a legal but as a practical and realistic matter, that fifteen state courts could as well or better handle the liquidation and distribution of the deposits of trust assets made by Fidelity Assurance Assosciation in those fifteen states, than could one Federal Court acting in Chapter X proceedings.

The nature of Fidelity's business, the contract between it and its contract holders, the deposits in trust made

pursuant to state law, all have been fully set forth in the above mentioned case, and also have been set out in the instant petition, and will therefore not be here repeated.

Since the instant case is more or less directly a part of *Fidelity* v. *Sims, supra,* it is necessary to give a little background of the general liquidation and distribution following remand of that case, in order to bring out clearly the problems involved specifically in the instant case.

Each of the fifteen state courts, following the remand, resumed their interrupted proceedings and ordered liquidation of the deposited assets in their states, and distribution of the proceeds.[18] Since the home office of Fidelity was in West Virginia and all its books and records were there located, it was necessary for the West Virginia Receivers and their counsel actively to cooperate with the other state authorities and to take part in their proceedings, both to minimize claims over against the surplus in West Virginia and to obtain surpluses in any state for return to West Virginia where such surpluses might exist. In each state court uniform proofs of claim were prepared and sent to all contract holders and hearings were had upon the question of distribution. Liquidation was had at

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[18] This Court held, in *Adam* v. *Saenger,* 303 U. S. 59, 82 L. Ed. 649, that it will take judicial notice of the laws of the several states to the extent that such notice is taken by the court of last resort wherein the proceedings were pending. The courts of Tennessee did not take judicial notice of all the proceedings in the other states, but we rely here, and did there, upon the well recognized rule that the courts of one state, in order to aid them in ascertaining and interpreting their own laws upon a particular subject, will take judicial notice of the *decisions* of another state court upon the same subject.

Therefore, the decisions of each of the state courts, even though in many instances unreported, were nevertheless made by courts of record, and are a part of the records of such courts. We submit that we can call this Court's attention, as we did in the Supreme Court of Tennessee, to the results or decisions of those cases, and can refresh the Court's judicial memory by quoting therefrom and supplying the name, style, citations, and location of the cases.

judicious times, and after all hearings had been completed, distribution was made.

In every instance except Tennessee, even though the wordings of the statutes varied greatly, the trial courts held that the trust deposit had been made, and based upon the aggregate cash surrender value of the contracts held by residents of that state, and that therefore distribution should be from the trust deposit, solely to resident contract holders with cash surrender value contracts. Thus each state paid its contract holders, if it was able so to do, 100% of the cash surrender value of the contracts and returned the surplus or balance of the deposit fund, after payment of necessary expenses, to the West Virginia Receivers, to be a part of their deposit fund. The amounts so returned have been stated in our petition, and will not be here repeated. With the exception only of Wisconsin and Tennessee, there was no appeal by anyone of the many thousands of contract holders from such decision. There were some questions of internal administration which were ironed out by state supreme courts. See, *State ex info. McKittrick, Attorney General, et al.*, v. *Fidelity Assurance Association, et al.* (Mo. 1944), 179 S. W. (2d) 67, and *State ex rel. James* v. *Marion Superior Court, etc.* (Ind. 1943), 51 N. E. (2d) 844.

In Wisconsin, as stated in our petition, the trial court held that the deposit fund should be distributed on a cash surrender value basis, and the Supreme Court refused to allow the Banking Commission to further litigate that question. See, *In re Fidelity Asurance Association*, 247 Wis. 619, 20 N. W. (2d) 638.

The Banking Commission did, however, litigate the question of whether the surplus should be used to pay preferred interest to Wisconsin cash surrender value contract holders, instead of returning that surplus to the West Virginia Receivers. The Supreme Court of Wisconsin held that

the surplus rightly belonged, and should be returned to West Virginia. See, *In re Fidelity Assurance Association*, 248 Wis. 373, 21 N. W. (2d) 730. This transfer has now been completed.

In order No. 58, entered by the Circuit Court of Kanawha County, West Virginia, on March 14, 1944, approving the report of the Special Commissioner, the Court held that all cash surrender value contract holders of non-depositary states and of West Virginia, should share equally the deposited trust fund in West Virginia; and in those states where the deposit was insufficient to pay 100% of cash surrender value, they should share in the West Virginia deposit, after those who looked primarily to it had received the same amount therefrom, as the others had from their own state deposits. This has been carried into effect.

By virtue of fortuitous circumstances and judicious judgment exercised in liquidation by all of the various state authorities, and by reason of the surplus turned over to West Virginia from the other states, the contract holders of Wisconsin, Illinois, Missouri, Delaware, Iowa and Alabama were paid 100 cents on the dollar of cash surrender values, and some contract holders in Ohio, Indiana and Kansas were likewise so paid. Contract holders in all other states have received to date 85% of their cash surrender values, and the Circuit Court of Kanawha County will, in August, 1946, order its Receivers to pay out from funds which they now have in their possession a further 15% dividend; so that every contract holder in the United States with a cash surrender value, except those in Tennessee, will by the time this brief is read, have received 100% of his cash surrender value.[19] We might add that more than

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[19] Said Order No. 58 of the Circuit Court of Kanawha County further provided for interest to all cash surrender value contract holders, of both depositary and non-depositary states, if and when there was a surplus in the deposit trust fund, after payment of 100% of cash surrender value. It now appears there will be a surplus for such interest payments.

99.6% of all such contract holders have been located and paid.

Each state court based its decision upon the fact that the deposit in its state had been made in trust to protect the current amount the company owed the contract holder in cash, and that current amount, as shown by the terms of the contract, and the tables set out therein, was the cash surrender value, which increased monthly as payments were made. Consequently, the deposits were increased from time to time.[20]

Each court held that each such contract holder had a specific lien upon that deposit fund for his cash surrender value to the exclusion of all other persons, and that the surplus was a part of the West Virginia deposited fund, and should be returned to it.[21]

Contracts approved by the various depositary state courts and the West Virginia court, were made to carry out the provisions of the distribution order, so that contract holders who could not be located when final distribution was made in a state could have their funds transferred to West Virginia, in trust, where they could later prove their claims and receive payment.

Thus, by reason of the decision of this Court in *Fidelity* vs. *Sims, supra,* fourteen state courts have paid out more than twenty-two million dollars to over fifty thousand contract holders, and have done so within three years from the time the matter was returned to them, and in many instances much less than three years.[22]

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[20] See Series B Contract, Sec. 13, and accompanying Table, R. 15.

[21] See Opinion Circuit Court of Dane County, Wisconsin, App. 86, and 21 N. W. (2d) 730; also R. 113, 114 (Illinois decision).

[22] See report of Haskins & Sells, independent auditors and accountants, to be filed in the Circuit Court of Kanawha County.

Tennessee Proceedings

This brings us to the Tennessee proceedings. As related in the petition, a creditors bill was brought in the Chancery Court of Davidson County, on April 21, 1941, and at a later time the West Virginia Receivers, with the permission of the Court, filed an answer in, and became a party to, the proceedings.

The statutes of Tennessee[23] effective in 1939 required investment companies such as Fidelity to maintain, in trust, with the Insurance Commissioner, a deposit of approved securities "at no time less than 100% of issuer's cash or current contract liability," and thereafter Fidelity did maintain such deposit in an amount not less than 100% of the aggregate net cash surrender value of all Tennessee contracts.

After the matter had been referred to the Clerk and Master on several occasions, and he had made his reports to the Court as to who had filed their claims and who were entitled to file but had not, and after notices were sent to all contract holders, the Court, on October 25, 1943, held a hearing to settle the legal questions as to the basis of distribution.[24] A number of contract holders, by their attorneys, appeared, but the respondent, Grant, neither appeared in person nor by counsel. The Court handed down a written opinion sustaining the cash surrender value method of distribution and holding that the fund was a trust fund for the sole benefit of Tennessee residents who had such cash surrender value contracts (R. 59), and on December 10, 1943, entered its final decree awarding judg-

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[23] See, Sec. 6057, Tennessee Code, as amended by Ch. 209 of the Acts of 1939, App. 65.

[24] See, decrees of Nov. 13, 1942 (R. 28), Jan. 22, 1943 (R. 30), May 7 1943 (R. 39), July 23, 1943 (R. 44), and Reports of Jan. 22, 1943, and Oct. 15, 1943 (R. 30, 45).

ments to such persons and rejecting the claims of any other persons against the deposit fund (R- 50).

After liquidation, the deposit fund in Tennessee amounted to $236,000.00, and there was $36,000.00 expenses. (R. 98). The cash surrender value contract holders filed claims amounting to $185,000.00 (R. 98), and those without cash surrender value contracts filed claims amounting to $7,457.11.

H. E. Grant, respondent herein, upon the uniform proof of claim sent him, stated that he had made seven payments of $15.00 each on two contracts, or a total of $210.00, and that his contracts had been lost (R. 41-43).

In the decree of December 10, 1943, in Part (3) thereof, the Court held, in part:

> "• • • the fund • • • will be distributed among the holders of contracts who were residents of the State of Tennessee on April 11, 1941, whose claims have been filed in this cause, *pro rata* according to the respective cash surrender values on said contracts as of April 11, 1941." (R. 51).

And in Part (4) the Court held, in that decree:

> "The Clerk and Master will, from the proofs of claims and contracts and other records on file in this cause, prepare and file a report showing the contract holders who will be entitled to participate in the distribution according to the principles above expressed and the amount of their respective claims." (R. 51).

No one appeared before the Clerk and Master following the reference, and his report was prepared and filed January 24, 1944 (R. 65). Attorneys for H. E. Grant appeared on Februady 3, 1944 (R. 65), for the first time, and objected to the report, stating:

> "H. E. Grant, holder of two Series B contracts, Nos. S-24083 and S-24084, hereby excepts to the report filed by the Clerk and Master on the 29th day of Janu-

ary, 1944, in so far as said report failed to recognize his rights to participate in the impounded fund." (R. 67).

The Master overruled this objection and presented his report to the Chancellor, who entered a decree of approval thereof on March 1, 1944.

To this decree, respondent Grant excepted, as follows:

> "H. E. Grant, holder of two Series B Contracts, Nos. S-24083 and S-24084, excepts to the decree rendered in this cause on December 10, 1943, Book 153, page 476, in so far as the decree denies him the right to participate in the distribution of the impounded fund." (R. 71).

The report then listed the names, contract numbers, and the respective amounts for the Tennessee residents to participate in the distribution of the deposit fund, based upon net cash surrender values of their contracts as of April 11, 1941, without interest thereon. (R. 68).

Grant then appealed. (R. 71).

Although the West Virginia Receivers were parties to the case, no notice of the objections, exceptions or appeal was served upon them until after Grant had perfected his appeal in the Court of Appeals. (R. 157).

As set forth in the petition, the West Virginia Receivers, together with older contract holders who would have been financially adversely affected by a reversal of the Chancellor's decision, filed various motions in the Court of Appeals. They deposited the full amount of Grant's claim and asked that judgment be taken against them and the case dismissed. (See Motion May 11, 1944, R. 71, 74, 78, 82). Grant objected and the Court of Appeals refused so to do, even though eighteen attorneys, on June 21, 1944, appearing for many contract holders, likewise appeared and asked the dismissal of the appeal. The Court of Appeals even refused

to allow the part fo the fund, which was at least 50% thereof, which was not in dispute, to be distributed, because Grant objected thereto, even though Grant was to be paid in full. (See petition July 11, 1944, and Motion (R. 79, 80), and Motion Oct. 12, 1944 (R. 96).)

The West Virginia Receivers and others raised the contention that Grant had never filed any pleadings in the court below, that although the Court's order of April 24, 1941, stated that interested creditors could come into the case by petition, no such petition was ever filed, and in taking his appeal, Grant served no notice on the West Virginia Receivers, nor on other than a few contract holders, and therefore had no right to appeal. This was overruled by the Court of Appeals.

The West Virginia Receivers and those joined with them stated that Grant's exceptions and appeals were solely on his own behalf; that therefore, he had no right to litigate any claim but his own. (See Motion to Remand of August 23, 1944, R. 83-90). This motion was overruled.

The Court of Appeals, after briefing and argument, then went on to decide that it was necessary to modify the judgment of the Chancery Court by having the Tennessee fund distributed as damages for breach of contract, and that all Tennessee contract holders who were not more than a year delinquent, whether they had a cash surrender value or not, could participate in such distribution, and the basis of distribution was to be the amount they had paid into the company, and remanded the case to have this judgment carried out promptly. (R. 97).

The effect of this was that the older contract holders with substantial cash surrender values, who had paid in faithfully for years, instead of receiving 100 cents on the dollar, would receive between 70 and 75%, and this although they had received a judgment for such amounts in the

Chancery Court which had become final by no appeal having been made therefrom within thirty days after December 10, 1943, as provided by Tennessee statutes (*ante*), *and* although they had never been served with any notice of an appeal, nor had any appeal ever been taken from the decretal judgments in their favor.

The further net effect was that those contract holders who had not achieved a cash surrender value, by failing to pay in the full twelve payments required by the contract before such cash surrender value was achieved,[25] those contract holders who were delinquent, such as respondent Grant, was and had therefore breached their contracts, those contract holders who had borrowed all but a few dollars of their cash surrender value, and those contract holders who had paid in only a few years and thus had achieved a very low cash surrender value, would stand to benefit, and would receive 70% of their claims, which was, of course, more than the small cash surrender values of those who had such, and was a money judgment in behalf of those who had not any cash surrender values. The last net result was that the surplus of $15,000.00 in the deposit fund which rightfully belonged to the West Virginia Receivers for the benefit of contract holders all over the United States, was taken from them.

Failure of the Tennessee Courts to Use Due Process of Law Before Depriving Petitioners of Their Property

The West Virginia Receivers, as will the older contract holders in Tennessee who have joined them, claim that the courts of Tennessee did not exercise due process of law in depriving them of their property, in violation of the

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[25] See Series B Contract, Sec. 13 (R. 15).

Fifth and Fourteenth Amendments to the Constitution of the United States. We contend that the phrase "due process of law" refers to the law of the land in each state, which derives its authority from the inherent and reserved powers of the state exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

We contend that the common law is the foundation of that which is designated as due process of law, and that actually the derivation was from Chapter 39 of Magna Charta, confirmed on the 19th day of June, 1215, wherein it was declared: "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

We believe that the effect of the guaranty is to inhibit the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure.

We realize that due process depends upon the necessities of the situation, but we insist that it must be understood to mean law in the regular course of administration through courts of justice according to those rules and forms which have been established for the protection of private rights.

We believe that the Fifth and Fourteenth Amendments to the Constitution were for the purpose of securing citizens against any arbitrary deprivation of their rights, whether referring to his life, his liberty, or his property; it is a limitation upon arbitrary power and a guaranty against arbitrary legislation.

We realize that an unsuccessful litigant merely by the loss of his property does not show that there has been a violation

of the due process of law guaranty. Even erroneous decisions, we realize, or an overruling of former decisions, is not in violation of the due process guaranty; however, if the error is gross and obvious, coming close to the boundary of arbitrary action, there may be a violation of the guaranty.

We further realize that the highest court of a state may clearly violate the due process clause, and this Court cannot interfere, unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.

It is within this latter category that we contend the instant case lies.

Our contentions will be that if the appellate courts of Tennessee, as they did, directly violated their statutes and every system of jurisprudence which they had set up for the litigation of causes, and thereby deprived petitioners of their property, then they have stepped across the indefinite line and have been guilty of taking property without due process of law. It is the unreasonableness and the arbitrariness with which the Court of Appeals acted, affirmed by the Supreme Court, of which we complain, and our complaint is that they did not act consonant with their own State statutes and procedure. We maintain it is necessary for the state laws and the courts thereof to adhere to certain fundamental rules.

While a State may have full power over remedies and procedure in its own courts and can make any order it pleases in respect of these, the substance of right must be secured and preserved to parties and litigants without unreasonable burdens.

Arbitrary action by the tribunal in the hearing of a cause or in its order violates due process.[28]

This Court has held that limitations as to appeals may be imposed with respect to the time within which they may be perfected, in *Oshkosh Waterworks Co.* vs. *Oshkosh,* 187 U. S. 437, 47 L. Ed. 249, 23 S. Ct. 234, and that there is no infringement of the constitutional provision by statute giving a further appeal from a judgment in a given tribunal which would otherwise be final. See, *Essex Public Road Bd.* v. *Skinkle,* 140 U. S. 334, 35 L. Ed. 446, 11 S. Ct. 790.

But it is also held that rights acquired by a judgment are property rights which cannot be taken by due process of law. As stated in *Collins* vs. *Welsh,* 75 F. (2d) 894:

> "• • • the second contention of the appellant that the rights acquired by his judgment are property rights which cannot be taken without due process of law. That such rights are property rights is unquestioned. That they cannot be taken without due process of law is equally well settled."

See also, *Gilman* vs. *Tucker,* 128 N. Y. 190, 28 N. E. 1040, 13 L. R. A. 304, wherein the Court held that property rights are created by the rendition of a judgment which even the Legislature had no power to reach and destroy. The Court held that the amendment to the statute in effect attempted to reverse the judgment and give to one that which the courts had deliberately adjudged belonged to another.

It is also the general rule with reference to priority of liens that the lien which is first in point of time is first in right, but as between private parties, this priority of liens cannot, as to vested liens, be modified without depriving the prior lienholder of his property without due process.

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[28] The above statements of law and principle are so fundamental, and have been so often repeated by this Court, that we have deemed citation in support thereof unnecessary.

See, *Fisher* v. *Wineman,* 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 192; *Pacific Spruce Corp.* vs. *Oregon Portland Cement Co.,* 133 Ore. 223, 286 P. 520, 289 P. 489, 72 A. L. R. 1507. See also, *Sully* vs. *American Nat. Bank,* 178 U. S. 289, 44 L. Ed. 1072; Insolvency, 14, R. C. L., 626.

In the *Oshkosh Waterworks* case, a municipality changed its charter so as to protect it from suits upon claims which had not first been presented to city council, and wholly or partially disallowed, either by affirmative action or by failure of that body for more than sixty days to pass thereon, and provided that its action was final and conclusive unless within twenty days an appeal therefrom be perfected to the proper circuit court, in which the case was to be tried *de novo.*

The Court went into the decisions of Wisconsin and found that it had been there definitely determined that *if the appeal had not been taken within the time limit prescribed, it went to the jurisdiction of the subject matter and could be raised at any time,* and that the time limit was a final and complete bar to any further prosecution of the claim.

The Court held that the time limit of twenty days within which to effect an appeal was not unreasonable.

First Federal Question

Section 9047, Williams Annotated Code of Tennessee, provides the time allowed for appealing and giving appeal bond, in the following words:

> "When an appeal or appeal in the nature of a writ of error is prayed from a judgment or decree of an inferior court to the court of appeals or supreme court, the appeal shall be prayed and appeal bond shall be executed or the pauper oath taken within thirty days from the judgment or decree, if the court holds so long, otherwise before the adjournment of the court, * * *."

The statute further provides that the giving of the bond may be extended by the Court not to exceed thirty days additional.

The final judgment of the Court settling the rights of all parties in the deposit fund was entered December 10, 1943 (R. 50). The appeal of Grant was taken March 1, 1944 (R. 71).

The provision as to this time limit is mandatory in Tennessee. See, *Wright* v. *Dorman,* 155 Tenn. 189, 291 S. W. 1064; *England* v. *Young,* 155 Tenn. 506, 296 S. W. 14.

In the former case, the Court held that the power of the trial court over its judgment, no appeal having been perfected, does not expire until thirty days from the rendition thereof.

In *Durham Coal & Iron Co.* v. *Bischel,* 4 Tenn. App. 233, the Court held that under this section, judgments became final and binding after thirty days, and in no event could the Court, after the lapse of thirty days, extend the time for filing of a motion for a new trial.

It has further been held that the statute cannot be evaded on the theory that the judgment is within the breast of the judge during the term, and that he could set it aside after the expiration of the thirty days and enter a new judgment from which an appeal can be prosecuted. See, *Memphis & C. R. Co.* v. *Johnson,* 16 Lea (84 Tenn.) 387; *Ellis* v. *Ellis,* 92 Tenn. 471, 22 S. W. 1; *Louisville & N. R. Co.* v. *Ray,* 124 Tenn. 16, 134 S. W. 858; Ann. Cas. 1912D, 910.

In *Shipley* v. *Barnett,* 161 Tenn. 437, 32 S. W. (2d) 1022, it was held that the trial court loses control over a final judgment even before the end of the term, where the term extends longer than thirty days from the date of the judgment without the entry of any motion or order affecting it.

Section 9048, Williams Code, provides:

> "In all cases where the appeal has not been prayed for within the time prescribed in the last section, the judgment or decree may be executed."

Therefore, the question arises as to whether or not the decree of December 10, 1943, entered by the Chancery Court, was interlocutory or final.

Section 8829, Williams Code, under the heading, "Interlocutory or Final," states:

> "A judgment or decree may be interlocutory or final, to be determined by the subject matter and substantial purport thereof."

In the annotated cases, it is stated:

> "An interlocutory decree, which is a mere order adjudging no issue, is subject to revision and reconsideration at subsequent term. Citizens Bank & Trust Co. v. Bayles, 153 Tenn. (26 Thomp.) 40, 281 S. W. 932."

However, "if it settles a principle, adjudges a right, or determines an issue, an interlocutory decree is not subject to revision at a subsequent term." *Citizens Bank & Trust Co.* v. *Bayless, supra; Mayor & Aldermen* v. *Love,* 160 Tenn. 177, 22 S. W. (2d) 769.

As late as 1942, the Supreme Court of Tennessee, in *Battle* v. *National Life and Accident Insurance Co.,* 157 S. W. (2d) 817, definitely determined the difference between interlocutory decrees and final decrees. Syllabi 1 and 2 are as follows:

> "1. Circuit court was without jurisdiction on March 17, 1941, to set aside judgment of August 10, 1939, adjudging the plaintiffs were entitled to recover from defendant and ordering a reference to clerk as to amount of defendant's indebtedness to plaintiffs.

"2. Generally, if an interlocutory decree settles a principle, or adjudges a right, or determines an issue, then it is not open for revision at a subsequent term, but if it be a mere order adjudging no issue, such as an order concerning the preparation of a cause, or an order granting an injunction, or dissolving or modifying one, it is subject to revision at a subsequent term, since it is in no sense an adjudication of rights."

That was a suit to recover damages for breach of contract, and on August 10, 1939, the Court entered an order in which it found "in favor of each of the respective plaintiffs, but the evidence being insufficient to show the amount the plaintiffs are entitled to recover, it is accordingly ordered that these cases be, and the same are hereby referred to the clerk * * * to determine the total amount of premiums paid by plaintiffs to defendant." On March 17, 1941, the Court, on the defendant's motion to have the judgment of August 10, 1939, declared void, held the same to be vacated and set aside.

Plaintiffs appealed, and the Court held:

"Unquestionably the Circuit Court was without jurisdiction on March 17, 1941, to set aside the judgment of August 10, 1939, in which the rights of the parties were adjudged and a reference ordered as to premiums paid by plaintiffs and the sums paid them by defendant under the disability or other provisions of the policies. * * * (Cases cited).

'While the line between interlocutory decrees, subject to be revised at a subsequent term, and those not subject to such reconsideration, cannot be scientifically defined, yet it may be stated as the general rule that, if such interlocutory decree settles a principle, or adjudges a right, or determines an issue, then, in such case, it is not open for revision at a subsequent term. *Allen* v. *Shanks,* 90 Tenn. 359, 16 S. W. 715; *Boyd* v. *Simms,* 87 Tenn. 771, 11 S. W. 948;

Johnston v. *Hanner*, 2 Lea 8; *Meek* v. *Mathis*, 1 Heisk. 534; *Vaccaro* v. *Cicalla*, 89 Tenn. 63, 14 S. W. 43 * * *."

* * * * * * *

"In other words, all interlocutory decrees which determine an issue shall be treated as final and not subject to review at a subsequent term.

"It is next insisted that the judgment of August 10, 1939, is void for uncertainty of amount. To this we are unable to agree."

Therefore, our contention is that when the decree of December 10, 1943, stated that the fund "will be distributed" among Tennessee contract holders whose claims have been filed in the cause "pro rata according to the respective cash surrender values on such contracts" it was a final judgment order in favor of certain definite contract holders, and a judgment rejecting the claims of certain other contract holders, including Grant, and became absolutely final and unappealable, under Tennessee law, after thirty days.

The fact that the Court had the Master ascertain the exact amounts to be allowed did not destroy the finality of the decision, because that was a mere clerical or mathematical determination. See, *Radio Station WOW, Inc.*, v. *Johnson*, 326 U. S. 120, 89 L. Ed. 2092.

Therefore, we firmly maintain that since the appeal was not taken until nearly four months after the final decree was entered, it was barred by Tennessee law; that the Court of Appeals lacked jurisdiction over the subject matter, and in purporting to take such jurisdiction, reversing the decree of the Chancery Court, and depriving petitioners of this $15,000.00 surplus, that Court acted, and was affirmed by the Supreme Court of Tennessee in so doing, without due process of law.

This is the first question for decision.

Second Federal Question

The matter came on for hearing in the Court of Appeals, and the appellees, the West Virginia Receivers and the Tennessee cash surrender value contract holders contended that Grant never became a party to the proceedings below, never filed any intervening pleadings, and hence had no right to appeal, since Williams Code of Tennessee, Ann., Sec. 1940, provides:

> "Any one or more *parties* to a judgment or decree may pray and obtain an appeal therefrom, the judgment remaining *in full force against such of the parties* as do not appeal."

The appellees there, petitioners here, further contended that in any event Grant alone excepted and appealed, and did so solely because of the rejection of his own claim, and hence he did not represent anyone other than himself; that by the statute, the judgments against others situated similarly to him had to remain in full force and effect, and likewise the judgments in favor of the cash surrender value contract holders, not having been appealed from, and they being given no notice of the appeal, could not be in any manner changed or affected. Also, these petitioners contended that since they had deposited the full amount Grant sought, and moved for judgment against themselves in that amount, any further questions were moot, and the Court had no jurisdiction to decide thereon.

The Court of Appeals having found against petitioners on all grounds, and specifically against them on the grounds above set up, we submit that Court acted without jurisdiction in the premises, and hence deprived petitioners of their property without due process of law.

Grant No Party to Proceedings

In 1 Clark on Receivers, 2d Ed. 916, it is stated:

> "The effect of filing a claim with a receiver is to inform the receiver and give him notice of the claim, its nature and the amount of same. The filing of a claim is *not equal or equivalent to a pleading* in the case in which the receiver is appointed."

The author also states (p. 916) that the filing of a claim with the receiver *has not the force and effect of intervention,* because the claimant does not become a party to the receivership suit, and further states (p. 923):

> "When this claim is disallowed, the holder of the claim may intervene in the receivership case, ask that he be made a party, and formally present his claim to be heard by the court. He may also, if circumstances of the case demand it, ask leave to sue the receiver on his claim, thereby placing himself in a position to have the judgment of the court reviewed."

As the author says, Section 657, page 923:

> "Strictly speaking, a claimant not a party to the suit has no right to file a motion in the suit, and before filing such a motion should ask leave to be made a party."

Thus, our contention is clear. Grant at no time became a party to the suit, nor took any steps which would cause him to be made a party. His claim was rejected by final order of the Court on December 10, 1943. He did not appear before the Master, but on February 3, 1944, objected to the Master's report because it failed to allow him the sum claimed. He excepted to the confirmation of that report on March 1, 1944. And in each of those first two appearances, Grant, in writing, made it distinctly plain that he was interested in his own claim and the claim of no other

person. Grant did not thereafter become a party to the proceedings, but filed his appeal from the rejection of the allowance of his own claim alone.

The Tennessee cases likewise hold Grant never became a party. In *Brown* v. *Brown*, 86 Tenn. 277, at 278, the Court stated, in part:

> "* * * we find that the persons made defendants therein are not proceeded against as a class of persons. This is indispensable in order to invoke the operation of the chancery rule on that subject: 'Where it is attempted to proceed against two or three individuals as representing a numerous class, it must be alleged that the suit is brought against them in that character.' In the case at bar the defendants were proceeded against individually * * *, and no attempt whatever was made to fix upon any of them a representative character, either within the letter or spirit of the chancery rule."

See also, *Nancy* v. *Busby*, 91 Tenn. 218, at 227, citing *Beatty* v. *Kurtz*, 2 Peters 585, 7 L. Ed. 521, and Gibson's Suits in Chancery (Tenn.), Sec. 92, p. 114, wherein it is stated:

> "Therefore the general rule that all persons interested must be made parties, is not adhered to: * * * (2) Where the parties are numerous, but the general rights of those entitled to relief are the same, in which case one or more of them may *sue* on behalf of all."

Also, in *Hansberry* v. *Lee*, 311 U. S. 32, 85 L. Ed. 22, substantially the same question as is raised in the instant case was determined. This Court said:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under State constitutions and laws, subject only to the requirements of the Constitution

of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. Western Life Indem. Co. v. Rupp, 235 U. S. 261, 273, 59 L. Ed. 220, 224, 35 S. Ct. 37.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; 1 Freeman, Judgments, 5th ed., Sec. 407.

* * * * * * *

"The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. * * *

* * * * * * *

"* * * Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far."

Grant Did Not Appear for a Class

Not only do the above cases prove Grant never became a party, but they likewise prove he did not, and had no right to appear for a class, particularly to change judgments

in favor of other persons, without notice to, or process served upon them, including these petitioners.

The case of *United States Fidelity & Guaranty Co.* v. *Rainey,* 120 Tenn. 357, 113 S. W. 397, gives the Tennessee law. In that case a creditor's suit was brought by the Guaranty Company as surety on the bond of a defaulting county clerk, and was instituted against twenty-seven defendants as class representatives of 659 individual creditors. Fifteen of the twenty-seven failed to answer. However, from time to time other creditors came in and *filed intervening pleadings* setting up their claims. The bill was filed April 5, 1901, and on January 25, 1906, the Chancellor modified and approved the Master's report allowing certain claims and settling the principles of law under which recovery could be had.

On May 21, 1906, before distribution of the fund under the decree, but at a term subsequent to the rendition of the final decree, a creditor presented an *intervening petition* for allowance of a claim, which the Chancellor refused to permit because intervention was not made in due season.

The Supreme Court held that before distribution any creditor could present a petition for his claim and *become a party,* and was entitled to a pro rata share in the distribution, but that the creditor, in so doing, *was bound by the decrees of distribution entered prior to his participation in the proceedings.* The Court stated:

> "We think it quite clear that this company had a right, before the final distribution of the funds by the Chancellor in the Court below, *to become a party to said cause,* and present its claim. * * *
>
> "The Chancellor, in our opinion, was in error in holding that the petition had not been filed in time. * * *
>
> "* * * any owner of a claim is entitled to present it and share in the fund at any time before it has been finally distributed."

The Court of Appeals refused to follow this case, but cited several others, to the effect that where a principal and his sureties are sued, an appeal by the principal will bring up for review a judgment against his sureties. Surely such cases are so inapplicable as to warrant the statement that the Court acted arbitrarily and capriciously, and thus violated the due process clause, especially when sustained by the Supreme Court of Tennessee.

In other words, when the Court of Appeals, sustained by the Supreme Court, held that Grant appeared as a class representative, and that as such the determination of his appeal would reopen the *res adjudicata* and unappealed from judgments of all other contract holders, we contended then, as we do now, that petitioners' rights, including those of the older contract holders, were violated, and the Court acted without due process of law.

Third Federal Question

As the Supreme Court of Wisconsin stated in the case of *In re Fidelity Assurance Association,* 248 Wis. 373, 21 N. W. (2d) 730:

> "When a claim is allowed, the allowance in effect amounts to a judgment * * *."

Therefore, we maintain that the decree of December 10, 1943, or, for the purpose of argument, the decree of March 1, 1944, was a decretal judgment as to each of the 530 individual claimants, and that when no person at any time appealed, with the exception of Grant, from any of such judgments, that they became *res adjudicata* and could not be rendered void or destroyed by the appellate courts, especially since no appeal was taken by anyone from the awarding of such money judgments.

Grant, by appealing from the judgment disallowing him a claim, might have had a right to be heard as to whether

error had been committed in depriving him of something to which he was entitled.[27]

But our contention is that each of the 529 other judgments was unaffected by Grant's appeal; that, therefore, when the courts in Tennessee arbitrarily, and without legal right, set aside those judgments in favor of the many contract holders with cash surrender values, and reduced the amounts of the judgments allowed them by the Chancery Court, and as to the contract holders without cash surrender values, reopened those judgments and awarded them substantial sums of money when the *res adjulicata* judgments order allowed them nothing, then that was an action depriving those cash surrender value contract holders of their property and taking it from them without due process of law.

And the West Virginia Receivers, being entitled to the $15,000.00 surplus (see, *In re Fidelity Assurance Association,* 248 Wis. 373, 21 N. W. (2d) 730), had this taken from them by reason of the Court's reopening the *res adjudicata* and unappealed judgments of those without cash surrender values, and giving them awards which wiped out that $15,000.00, and thus had their property taken from them without due process of law.

In other words, if, as we strongly maintain, there were 530 individual judgments rendered, each of which became final and *res adjudicata* when the statutory appeal time passed by Tennessee law, and by that same law Grant's appeal affected only his individual claim, but the Court, without legal authority or right, nevertheless set aside those final judgments and made new and final awards, and in so doing wiped out the $15,000.00 which under proper legal procedure the West Virginia Receivers were entitled

[27] Except when the full amount of his claim was paid into court, and it was moved he be given judgment therefor, we submit the Court was compelled to grant the motion and dismiss the appeal.

to receive, and reduced the amount of money the older Tennessee cash surrender value contract holders were to receive, then the Receivers and such contract holders were deprived of their property without due process of law.

And as the case of *United States Fidelity & Guaranty Co.* v. *Rainey, supra,* held, there was no right to reopen those judgments under Tennessee law, and the best that Grant could have had would have been a payment of his claim, without disturbing the other judgments.

In the case of *Fidelity* v. *Sims, supra,* this Court held that "the security afforded classes of certificate holders according to State law cannot be avoided in any distribution of assets," (318 U. S., at 618), and further, "There is one greatly predominate class of creditors—certificate holders—all having security for their claims on one or more desposit with state authorities, and all having unsecured claims against the unpledged assets of the debtor." (318 U. S., at 617).

The West Virginia Receivers contended that in each of the depositary states, including Tennessee, the deposit in each state was made in trust for the benefit of contract holders with cash surrender values to their contracts; and that the group, and all other contract holders having no such cash surrender values, did have claims for damages for breach of contract against the undeposited and unpledged assets.

The West Virginia Receivers and older contract holders reiterate that it is their contention that the funds deposited in Tennessee were a trust fund, set aside for the benefit of those Tennessee contract holders who had cash surrender values to their contracts, and no other persons.

As the affidavit of one of the West Virginia Receivers, Mr. Smith (R. 63), states:

> "No deposit was made in Tennessee or any other state until the contract in question had achieved a cash

surrender value; and accordingly, those accounts which showed no value but do have a small reserve value were not actually protected by a deposit in your state (Tennessee)."

The Chancellor of Davidson County, Tennessee, stated, in his opinion in this case, held (R. 54):

"Under the statute above quoted, there was certainly no deposit based on the amount paid in. * * *

"An examination of the form of contract and the manner in which the deposit was ascertained, leads to the conclusion that the persons for whom the deposit was made, and whose contracts were taken into account in determining the amount of such deposits, were those whose contracts had a paid up[28] or cash surrender value.

"The fund in question partakes of the character of a trust fund for the benefit of certain definitely ascertainable persons. Insolvency of the company did not change the character of this deposit in Tennessee. * * * (R. 55)

"* * * the Court in the case at bar, is not dealing with the question of what to do with the assets of an insolvent company in a distribution of its assets among various types and kinds of creditors, but, on the other hand, is dealing, here, with a particular fund created pursuant to statute, and under contract, for a specific purpose, and which fund, the Court is convinced, is in the nature of a trust fund." (R. 55).

And again the Chancellor stated (R. 59):

"This Court is convinced, as hereinabove stated, that the fund was in the nature of a trust fund for the benefit of those who had acquired values under their contracts with the Fidelity Assurance Association, and to the extent of those values. The language of the

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[28] The words "paid up" were a term of art, meaning a contract upon which all installment payments had been completed.

Act and the way in which the fund was created and handled throughout, seem to support this view.

"This being true, the mere fact that a contract holder had a right of action against the company under his contract at the time of receivership, did not necessarily entitled him to participate as a lienor against the fund in question. On the other hand, every creditor of whatever class, secured or unsecured, it seems, has a right in those funds in the hands of the West Virginia Receivers which are known as 'free assets' of the company, and the Court is of the opinion that those who claim on the basis of the amount paid in, but who did not have cash surrender values in their contracts at the time of receivership, should look to the said 'free assets' of the company for the payment of their claims, and that the fund herein involved should be distributed, after payment of costs and expenses, on the basis of the cash surrender values of the contracts."

It is petitioners' contention that this fund falls directly within the language of this Court in *Blake* v. *McClung*, 172 U. S. 239, 43 L. Ed. 432, when the Court stated:

"* * * the objections to the statutes of Tennessee do not necessarily embrace enactments that are found in some of the States requiring foreign insurance companies, as a condition of their coming into the State for the purposes of business, to deposit with the state treasurer funds sufficient to secure policy-holders in its midst. *Legislation of that character does not present any question of discrimination against citizens forbidden by the Constitution.* Insurance funds set apart in advance for the benefit of home policy owners of a foreign insurance corporation doing business in the State are a *trust fund of a specific kind to be administered for the exclusive benefit of certain persons.* * * * *funds or property specifically set aside as a trust fund, and at the outset put into the custody of the State, for the exclusive benefit, or for the benefit primarily, of Tennessee creditors,* * * *."

And when the trust fund is released by the decision of the Court, we think the case then falls directly within the provisions of the decision of *Rollo, Assignee,* v. *Andes Ins. Co.* (Va.), 23 Gratt. 509, wherein the Court stated:

> "The treasurer is required by the statute to retain the securities in the treasury for the special objects contemplated by the act, until the liabilities of the company are settled or terminated. So long as anything remains to be done, so long as these liabilities continue, he is expressly prohibited from disposing of or surrendering them. * * * He *holds the securities in trust, to be administered, first for the people of Virginia, and then for the company making the deposit.* This is the distinction given them by law, controlling not only the treasurer but the courts also; * * *
>
> "* * * The theory of this whole legislation is, that a foreign insurance company may come into the State, deposit its funds and securities with the treasurer, and carry on business here for an indefinite period. However long this may continue, *the securities deposited cannot be surrendered or subjected to the claims of creditors.* If this exemption be wrong, * * * the policy of this legislation is bad, and ought to be abandoned."

Therefore, we contend that the Court of Appeals of Tennessee, sustained by the Supreme Court, had no right to set aside the trust liens of the older cash surrender value contracts on the deposited fund, and deprive them of a part thereof for the benefit of unsecured creditors, and in so doing wipe out the right of the West Virginia Receivers to the surplus of that trust fund, which is to be used for the benefit of contract holders having rights against such trust funds throughout the forty-eight states.

The officials in the fourteen states outside of Tennessee, as well as all their contract holders, are deeply interested

in this question, and believe that the Tennessee Court had no right to deprive the contract holders throughout the United States of this surplus for the benefit of Tennessee unsecured creditors.

Fourth Federal Question

If the Supreme Court of Tennessee should be correct that it had a right to set aside the trust liens on the deposited assets and make the deposit fund open to general creditors for damages for breach of trust, then it may not hold such funds solely for the benefit of its own unsecured creditors and pay them more therefrom than can the general creditors of a similar kind throughout the United States receive from the domiciliary receivers.

We contend that damage claims such as these are claims of general creditors, and not trust claims, under the decision of *U. S.* v. *Knott,* 298 U. S. 544, 80 L. Ed. 1321, because such claims cannot be perfected until actually proven in court.

That case is nearly exactly in point, in that it held that despite a contrary decision by the Supreme Court of Florida, damage claims for breach of contract by reason of insolvency were not liens against a deposit fund unless reduced to judgment prior to insolvency, and hence were mere "inchoate liens" until actually reduced to judgment.

Therefore, by removing the trust liens on the deposited funds, and making them open solely to claims of general resident creditors for damages, the Supreme Court of Tennessee again attempts to do what it was twice forbidden by this Court to do, in *Blake* v. *McClung, supra,* in attempting to give local citizens a preference for general claims against assets of a defunct company fund in Tennessee, to the detriment of similar non-resident creditors.[29]

[29] It is undisputed that there are no general assets in the hands of the domiciliary receivers from which other general creditors could be paid.

In his opinion, the Chancellor in the instant case recognized the danger of attempting to do the very thing the Supreme Court has ordered done. In that opinion he stated:

> "• • • it is pointed out that the general law is to the effect that no matter how much of general assets of an insolvent corporation are found by creditors in any state, these creditors, in that state, are only entitled to receive, on their claims, the same percentage that the claimants everywhere receive, that is, the amount that the domiciliary receivers are able to pay everyone. Thus if a theory is adopted that would strip the fund in question of its character as a trust fund, for a particular category of creditors, it might well be argued that the claimants would lose their preferred status and thus fall under the above rule."

The Chancellor cited the cases of *Blake* v. *McClung*, 172 U. S. 239, 43 L. Ed. 432, 176 U. S. 59, 44 L. Ed. 371; *Sully* v. *American National Bank*, 178 U. S. 289, 44 L. Ed. 272.

Other cases directly in point are, *Carpenter* v. *Ludlum*, 69 F. (2d) 191, certiorari denied, 78 L. Ed. 1028, which again involved Tennessee; *Brunner* v. *York Bridge Co.*, 76 W. Va. 702, 98 S. E. 233. See collection of cases in 1 A. L. R. 648, and 92 A. L. R. 590.

Therefore, the Court's decree that such fund shall be distributed to all Tennessee residents as damages for breach of contract, which we claim constitute merely general claims, is awarding a preference and discrimination to Tennessee residents as against the non-resident contract holders throughout the United States, and unconstitutionally deprives the latter of their rights under the law.

Supreme Court of Tennessee

Certiorari was granted by the Supreme Court of Tennessee. There the same questions which had been raised by petitioners and adversely decided by the Court of Appeals were again presented, but the Court affirmed the decision below in a written opinion. Motions for rehearing were filed, together with a petition for a stay in the event of a rejection thereof. A second written opinion was handed down overruling the petitions for rehearing, a stay of ninety days was granted and bond set at $25,000.00, although until that time no bond had been required of Grant, who by reason of his $210.00 claim was holding up distribution of a $200,000.00 fund.

Because of the nature of the second opinion, second petitions for rehearing, with permission of the Court, were filed, and after six months further study, the Supreme Court handed down a third written opinion, revoking the second written opinion, refusing a stay, and remanding the case to the Chancery Court with directions promptly to carry out the distribution of the funds in accordance with the first opinion rendered, and overruling all of the motions made, including a motion to remand for the purpose of obtaining proper evidence concerning the delinquency of Grant on his contracts; but again the Court decided against these petitioners on all grounds.

There was also raised in the Supreme Court for the first time the question that the Supreme Court's interpretation of the depositary statute was unconstitutional and would impair the obligations of the contracts of those with cash surrender values. It was contended that under Section 1 of the Series B Contracts, requiring a deposit to be made, in trust, in West Virginia, such a deposit had been made for the benefit of such persons, and which deposit had been

transferred to Tennessee upon the enactment of their depositary statute, in 1939; that for the Court now to hold that such persons lost the benefit of that deposit, made for them, would impair the obligation of the contract requiring a deposit to be made for their sole benefit.

The second opinion of the Supreme Court rejected this contention, and the third opinion, withdrawing the second opinion, ignored the contention entirely.

Conclusion

The instant Tennessee statute involved, or a similar statute, was interpreted by fourteen State courts, each in an exactly similar and uniform manner, and the surplus in each depositary trust fund was returned to the West Virginia Receivers. Although more than fifty thousand contract holders were involved in those proceedings, no single contract holder, except the respondent, sought relief in the appellate courts. While this does not make either Grant or the Supreme Court of Tennessee necessarily wrong, we believe it a fair indication that the contentions of the respondent Grant are wrong, and the other states having unanimously decided to the contrary, we believe it an indication that the Supreme Court of Tennessee is wrong.

The apparent purport of the Tennessee decision is an attempt, by means which we consider unlawful, to use up the entire Tennessee fund in some manner, and to distribute that fund as widely as possible among Tennessee residents, regardless of the lawfully acquired rights in the fund.

We respectfully submit that under the decision of *Fidelity* v. *Sims, supra,* and the implied directions therein contained, the fourteen depositary states have carried out their duties as promptly, as equitably, and as fairly as possible, and as this Court would have desired those duties to be carried out; and have succeeded, through fortuitous cir-

cumstances and some good hard work, remarkable showing in a rather short seems to us a pity that the completion of be spoiled by one selfish contract holde the full amount of his claim as a nuisa the sole purpose of not delaying distrib to others; nor should the Supreme Cou permitted, as it has unsuccessfully tried selfishly to keep within its borders all corporation over which it can claim juri the use of its own residents, regardless and equities of non-residents.

And also it seems to us a shame that holders for whose benefit and protectio was specifically enacted, and whose own ited pursuant thereto, should, because of tion of that statute, be deprived of the p lature sought to insure them.

In other words, had no statute ever b nessee, purporting, in time of need, to local residents, then the Tennessee ca contract holders, as residents of a no would by now have received 100% of value of their contracts from the West and later would receive some interest cause the Legislature sought further to now only receive 75 cents on the dollar less, without any interest thereon. Thi fair nor right, and this Court is the c those people can now go, and the onl West Virginia Receivers, who have acte all such contract holders throughout th the nature of *parens patriae,* can go to relief, as well as relief for themselves.

aking a very of time. It record should was offered alue, and for of $185,000.00 Tennessee be her occasions, of a defunct on, solely for e legal rights

essee contract pecial statute ey was depos- er interpreta- ion the Legis-

assed in Ten- protection for rrender value ositary state, ash surrender nia Receivers, eon. Yet, be- ect them, they eir claims, or t doesn't seem lace to which ace where the the benefit of ited States, in them effective

We respectfully submit that they are legally entitled to relief, and that the petition for writ of certiorari should be granted.

Respectfully submitted,

A. P. HUDSON and H. ISAIAH SMITH,
Special Receivers, etc., Petitioners,
By: ARTHUR B. KOONTZ and PATRICK D. KOONTZ,
J. CAMPBELL PALMER, III.

Deposits to be made with the Treasurer.—Before a license to transact business in this State shall be issued by the insurance commissioner to any person, association, or corporation within the purview of section one of this article, the insurance commissioner shall require the applicant to deposit with the state treasurer (in accordance with article five, chapter twelve of this code), in trust, for the benefit of its contract holders, bonds of the State of West Virginia, or such other bonds, and securities including bonds issued by the West Virginia bridge commission as may be approved by said insurance commissioner, or both, to the aggregate amount of one hundred thousand dollars, and, in addition to such deposit, such person, association or corporation shall maintain at all times a deposit with the state treasurer of bonds and securities approved by the insurance commissioner to an amount equal to the total amount which such person, association or corporation may be liable to pay in cash to the holders of all contracts under the terms thereof at the time of the deposit: Provided, That when, by the laws of any other state, any such person, association or corporation shall have been required to make and shall have made such deposit in such state, equal or greater in amount for the benefit of contract holders in such state, upon the filing of a certificate to such effect from the proper officer in such state with the insurance commissioner of this State, such person, association or corporation shall not be required to make such deposit with the treasurer of this State for the benefit of its contract holders in such other state; and when the laws of any other state require such deposit less in amount, such person, association or corporation shall file a certificate from the proper officer in such state with the insurance commissioner of this state showing the amount of the deposit made, and shall deposit with the treasurer of this state an amount which, together with the deposit made in such other state, shall make up the total amount required by this state to be deposited by such per-

son, association or corporation, and such contract holders in such other state shall not be entitled to the benefit of the securities deposited with the treasurer of this State under this article, except so much of such deposit as may be made to complete the total amount required by this article where the law of any other state requires a lesser amount.

The insurance commissioner may require an independent appraisal, at the expense of the company, of any property on which it holds a mortgage or trust deed or any bond or other investment offered by such company for the purpose of complying with the deposit provisions of this article.

WILLIAMS CODE OF TENNESSEE, SECTION 6057

6057 (3273a 122). Statements and documents to be filed with the commissioner before transacting business; filing fee; deposit of securities.

* * * * * * *

Provided, however, that if the securities offered or to be offered for sale in Tennessee be of the class known as "investment contracts," comprising the following: investment contracts, or annuity contracts other than those of qualified insurance companies, or installment investment certificates, or securities of like kind, which contemplate that the issuer shall pay or deliver, or whereby the issuer agrees to pay or deliver, either absolutely or conditionally, to the purchaser or holder of the contract, certificate, bond or like security, a sum of money at a future time, either with or without interest, in consideration of a payment or payments made or contemplated to be made by such purchaser or holder, which securities are hereinafter referred to as investment contracts; the investment company, or issuer, domestic or foreign, upon written request of the commissioner of insurance and banking of this state, shall deposit and maintain with the said commissioner, for the benefit of the holders of such investment contracts, a deposit of securities in cash or its equivalent; but the commissioner of insurance and banking may, in his discretion, accept as said equivalent, such securities as domestic life insurance companies are permitted to invest their funds in under section 6204

as amended of the official Code of Tennessee, in amount not less than $10,000 and at no time less than 100% of the issuer's cash or current contract liability on all such outstanding investment contracts, as defined herein, sold in the State of Tennessee. The commissioner of insurance and banking of this state shall hold as custodian the securities deposited for the benefit of the holders of the investment contracts coming within the provisions of this section. Williams' Code of Tennessee, Annotated (1934), Volume 4, Chapter 4.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES—

Article V—

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article XIV—

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws:

• • • • • • •

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

EDGAR B. SIMS, Auditor and Ex-officio Insurance Commissioner of the State of West Virginia,

vs.

FIDELITY ASSURANCE ASSOCIATION, a corporation.

Order No. 29

This 14th day of September, 1943, came H. Isaiah Smith and A. P. Hudson, Special Receivers of Fidelity Assurance Association, and recommended unto the Court that Order No. 1 be enlarged and broadened so as to permit them, as domiciliary receivers of said company, to intervene in liquidation proceedings pending in any of the fourteen states wherein the defendant, Fidelity Assurance Association, has heretofore made a deposit of securities, for the purpose of obtaining any surplus of said deposits over the liabilities thereof, of minimizing deficiencies therein, and aiding in the orderly liquidation and distribution of the proceeds of said deposits of securities.

It is therefore Ordered, Adjudged and Decreed that H. Isaiah Smith and A. P. Hudson, Special Receivers and domiciliary receivers of Fidelity Assurance Association, be, and they hereby are, authorized, in their discretion, to appear and intervene in any proceedings pending against Fidelity Assurance Association in the States of Alabama, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Missouri, Ohio, Pennsylvania, Tennessee, Virginia, or Wisconsin, for the sole purpose of aiding the proper distribution of the deposit formerly made in that state by said Fidelity Assurance Association among the contract holders and creditors entitled thereto.

It is further Ordered, Adjudged and Decreed that in the event that in any of said states there is a surplus remaining after such distribution, and the payment of costs and expenses, said H. Isaiah Smith and A. P. Hudson, as domiciliary receivers, are hereby authorized to receive said surplus.

List of Liquidation Cases in Fourteen States Wherein Fidelity Maintained Deposits

Robert Harris, as Trustee, etc. vs. H. Isaiah Smith and Arthur P. Hudson, as Receivers of Fidelity Assurance Association, a corporation, in the Circuit Court of Montgomery County, Alabama, In Equity No. 13974.

Matthew F. Judge, Walter F. Daley and William T. Reardon, as the Delaware Committee of Contract Holders of Fidelity Assurance Association, for themselves and for all other persons similarly situated, vs. Fidelity Assurance Association, a West Virginia Corporation, formerly known as Fidelity Investment Association; Frank E. Lynch, Jr., State Bank Commissioner of the State of Delaware, and Central Trust Company, a corporation of the State of West Virginia, Trustee under Chapter 10 of the Federal Bankruptcy Law for Fidelity Assurance Association, a West Virginia Corporation, in the Court of Chancery of the State of Delaware, in and for New Castle County.

Edward J. Hughes, as Secretary of State of the State of Illinois, vs. Fidelity Assurance Association, a corporation, in the Sangamon Circuit Court, State of Illinois, in Chancery No. 81582.

Joseph E. Kernel vs. Fidelity Assurance Association, a Corporation, et al, in the Superior Court of Marion County, Cause No. B-15189, Room No. 4, (Indiana).

G. R. Shaw, vs. Fidelity Assurance Association, formerly known as Fidelity Investment Association, Chas. R. Fischer, Commissioner of Insurance, State of Iowa, in the District Court of the State of Iowa, in and for Polk County, Equity No. 56314-102.

State of Kansas, ex rel., Jay S. Parker, Attorney General, vs. Fidelity Assurance Association, a corporation, in the District Court of Shawnee County, Kansas, No. 58,500.

R. E. Lusk, et al., vs. Fidelity Assurance Association, et al., Franklin Circuit Court, Kentucky, No. 38,574.

John B. Gontrum, Insurance Commissioner for State of Maryland, vs. Fidelity Assurance Association, in the Circuit Court of Baltimore County, Maryland.

State ex inf. Roy McKittrick, Attorney General of the State of Missouri, at the relation of Russell Maloney, Commissioner of Securities of the State of Missouri, vs. Fidelity Assurance Association, a corporation, H. Isaiah Smith, and Ross B. Thomas, Receivers of the Fidelity Assurance Association, a corporation, in the Circuit Court of Cole County, Missouri, No. 9388.

Thomas J. Herbert, Attorney General of the State of Ohio, on behalf of J. Roth Crabbe, Superintendent of Insurance of Ohio, and Supervisor of Bond Investment Companies, vs. Fidelity Assurance Association, a corporation, in the Common Pleas Court of Franklin County, Ohio, No. 166117.

Frank F. Levy, vs. Fidelity Assurance Association, heretofore known as Fidelity Investment Association, in the District Court of the United States for the Eastern District of Pennsylvania, Civil Action No. 1477.

L. H. Brooks, Trustee, et al., vs. Fidelity Assurance Association, et al., in the Chancery Court for Davidson County, Tennessee, In Part I of the Chancery Court for Davidson County Rule No. 57686.

Frederick William Tanner and Roy K. Flannagan, vs. H. Izaiah Smith and Ross B. Thomas, Receivers of the Fidelity Assurance Association (formerly Fidelity Investment Association); Fidelity Assurance Association, a West Virginia Corporation; and State-Planters Bank and Trust Company, a Vriginia Corporation, in the Circuit Court of the City of Richmond, Virginia.

In the Matter of Fidelity Assurance Association, a West Virginia Corporation, in the Circuit Court for Dane County, Wisconsin.

Edgar B. Sims, Auditor of the State of West Virginia and Ex-Officio Insurance Commissioner of the State of West Virginia, vs. Fidelity Assurance Association, a Corporation, No. 16724, in the Circuit Court of Kanawha County, West Virginia.

PROCEEDINGS IN CHANCERY COURT AFTER STAY GRANTED BY UNITED STATES SUPREME COURT

No. 57686

L. H. Brooks, et al.

vs.

Fidelity Assurance Association, et al.

In Part One Chancery Court, at Nashville, Tennessee

Certified Copies of the Following Papers: Motion of March 8, 1946, Decree of April 17, 1946, Petition of Lewis S. Pope, et al., Answer of L. H. Brooks, Trustee, et al., Answer of Isaiah Smith, et al., Decree of April 11, 1946.

Counsel: Lewis S. Pope, Jordan Stokes, III, and Whitworth Stokes, Petitioners.
J. G. Stephenson, and Farmer, Denney & Leftwich, J. Campbell Palmer, III, for Respondents.

Index—Rule No. 57686

	Original
Motion	Page 1
Decree of March 18, 1946 (158-29)	" 2
Petition of Lewis S. Pope, et al.	" 4
Answer of L. H. Brooks, Trustee, et al.	" 10
Answer of H. Isaiah Smith, et al.	" 14
Decree of April 11, 1946 (158-68)	" 18
Clerk's Certificate	" 19

On Motion Docket, Part I, Chancery Court

Motions for Friday, March 8, 1946

L. H. Brooks, et al.

vs.

Fidelity Assurance Ass'n, et al.

H. E. Grant moves the Court to make the judgment of the Supreme Court the judgment of this Court and for an

order of reference in accord with the opinion of the Supreme Court.

Lewis Pope, Whit Stokes, Jordan Stokes, to Fyke Farmer.

DECREE OF MARCH 18, 1946, M. B. 158 P. 29

In Chancery Court, Part One, at Nashville, Tennessee

57686

L. H. Brooks, Trustee, et al.

vs.

Fidelity Assurance Association, et al.

Decree

This cause came on to be heard on this the 18th day of March, 1946, upon the motion of H. E. Grant for a decree on the mandate and procedendo of the Supreme Court and for an order of reference in accordance with the opinion and decree of the Supreme Court, the certified copy of the order of the Honorable Stanley Reed, Justice of the Supreme Court of the United States in the case of A. P. Hudson and H. Isaiah Smith, Special Receivers, et al. vs. H. E. Grant, et al., which has been filed and is ordered to be made a part of the record in this cause, the petition of Lewis S. Pope and others for an advance of an attorneys fee, and the answers of H. Isaiah Smith and A. P. Hudson, Special Receivers for the Fidelity Assurance Association, appointed by the Circuit Court of Kanawha County, West Virginia, defendants herein, and the answer of L. H. Brooks, Trustee, et al.; upon consideration of which, it is ordered, adjudged and decreed by the Court:

(1) The motion of H. E. Grant for the order of reference pursuant to the decree of the Supreme Court of this State is for the present denied because of the granting of the stay by a Justice of the Supreme Court of the United States of further proceedings pending a decision of the Supreme Court.

(2) J. C. Dale, Jr., Clerk and Master, as Special Commissioner, will forthwith pay to each contract holder whose

claim was allowed as set forth in paragraph (A) of the former decree herein in Minute Book 154, Page 156, 50% of such allowed claim. Said allowed claim being the net cash surrender value thereof.

(3) J. C. Dale, Jr., Clerk and Master, as Special Commissioner, will forthwith pay to Messrs, Farmer, Denney & Leftwich, the balance of $26,000.00 of the fee allowed to said attorneys, all unpaid Court costs and the compensation allowed to the Special Commissioner by said former decree.

(4) The question as to an allowance of a present credit on attorneys fees for Messrs. Lewis S. Pope, Jordan Stokes, III and Whitworth Stokes, is reserved until the Court can consider the petition for the allowance of said fees, together with the answers and briefs of counsel.

PETITION OF LEWIS S. POPE, et al., Filed March 11, 1946

To the Honorable Thomas Shriver, Chancellor, holding Part One of the Chancery Court for Davidson County at Nashville.

Rule No. 57686

L. H. BROOKS, etc., et al.

vs.

FIDELITY ASSURANCE ASSOCIATION, et al.

Petition of Lewis S. Pope and Others

Petitioners, Lewis S. Pope, Jordan Stokes, III, and Whitworth Stokes, would respectfully show to the Court:

I

That they represented the claimant, H. E. Grant and others, in this litigation when the suit was pending in this Court and before any appeal was taken herein. That they indicated the decision which they desired Your Honor to make at that time. However, their insistence was not adopted by the Court and they then, on behalf of Grant and for the benefit of all other claimants to the fund and

for the benefit of the trust fund itself, prayed and were granted an appeal to the Court of Appeals.

Petitioners perfected this appeal by making a proper bond, designating the record, and filing assignments of errors with supporting brief in the Court of Appeals.

II

Numerous steps were taken in the Court of Appeals and in order to better understand the present position of petitioners a short history of these is hereafter set out.

Appellees filed a motion in the Court of Appeals for a remand of the case for the purpose of placing additional proof in the record, and for an order of distribution. Petitioners briefed the questions raised by these motions and they were successful in having the Court of Appeals overrule the motions. The Court of Appeals filed a written opinion with reference thereto on July 8, 1944. Petitioners would further show Your Honor that both the solicitors for the receivers and also the solicitors for Frederick Leake, et al., briefed the motions and it was necessary to prepare and file opposition briefs.

Thereafter Appellees Leake, et al., filed another motion to remand in the Court of Appeals. This motion was accompanied by a somewhat similar motion in the Chancery Court while the case was on appeal. This motion in the Court of Appeals was briefed by counsel for appellees and thus it was necessary for petitioners to file reply briefs and counter motions. The Court of Appeals responded to appellees motion in a written opinion by presiding Judge Felts on September 16, 1944, overruling the motion.

Thereafter numerous briefs were filed in the Court of Appeals by counsel for the Appellees, Receivers and Leake, et al., all of which briefs were replied to by your petitioners. The petitioners argued the case orally in the Court of Appeals and at some length.

Subsequently in a rather exhaustive opinion by Judge Felts, the Court of Appeals decided every issue raised on the appeal in conformity with the insistences of your petitioners. And, the Court of Appeals held expressly that the appeal was a class action and one for the benefit of all legal claimants to the fund.

III

Thereafter Appellees, Leake and the Receivers filed separate petitions for certiorari and supersedeas to the Supreme Court. In addition to the attorneys previously referred to, Joseph Martin, J. G. Stephenson and O. B. Hofstetter, joined with Farmer, Denney and Leftwich and Mr. Hofstetter filed a separate petition. All of the petitions complained of the action of the Court of Appeals. Petitioners replied to all such petitions by written briefs seeking to sustain the decision of the Court of Appeals.

Here we would like to point out to Your Honor the extensiveness with which these attorneys briefed their petitions for certiorari. Mr. J. Campbell Palmer, who with Koontz and Koontz, represented the Receivers filed the following briefs before the case was orally argued in the Supreme Court: Petition for Certiorari and Brief in Support (28 pages), Argument Brief (68 pages), Appendix to Argument Brief (25 pages),—these last two papers were subsequently printed and comprise 141 printed pages—Answer to Reply Brief (24 pages), Additional Answer to Reply Brief (18 pages), Rebuttal Brief (14 pages), Special Supplemental Argument Brief and Appendix (8 pages).

Mr. Farmer and the other attorneys mentioned also filed several briefs. It was necessary for petitioners to reply to all such briefs and this work was performed by them. The case was finally orally argued before the Supreme Court and in a written opinion by Justice Prewitt, the Court affirmed the Court of Appeals, thereby sustaining completely your petitioners insistences.

Counsel for Appellees, Receivers and Leake, et al., thereupon filed separate petitions to re-hear. The petition on behalf of the receivers was coupled with a motion to remand and in support of the petition and motion there was filed the following papers: Petition for Rehearing and Motion to Remand, Brief in Support of Motion to Remand, Brief Accompanying Petition for Re-Hearing and Motion to Remand, Further Brief on Point VIII of Motion to Re-Hear, and Final Brief on Re-Hearing. Petitioners prepared and filed reply briefs to all such papers. Thereafter the Su-

preme Court in a written opinion denied the petitions to re-hear and the motion to remand.

Thereupon counsel for receivers filed a motion for a stay of the mandate, this motion was also replied to by your petitioners. It was your petitioners insistence that if the motion was granted that a proper bond should be posted and this position the Court concurred in by entering an order to that effect.

Adversary counsel thereupon abandoned the stay of the mandate motion and did not file a petition for certiorari to the Supreme Court of the United States, but instead filed an application for permission to file a second petition for a re-hearing in the Tennessee Supreme Court. The Court granted authority to file such second petitions to re-hear and they were filed. Numerous briefs were then filed by adversary counsel in support of the petitions and your petitioners replied to most of these. The Supreme Court in a written per curiam opinion on March 2, 1946, denied these petitions, clarified its original opinion, adjudged the costs against the Receivers and Leake, et al., and remanded the case to your Honor's court to be further proceeded with in accordance with the opinion and decrees of the Supreme Court.

IV

In response to the first petition to re-hear the Supreme Court used some language (later this language was recalled in its final opinion) which made it necessary that a petition be filed in Your Honor's court setting out how the deposit trust fund in this case was originally made in Tennessee. Petitioners procured the necessary information, facts, and exhibits, prepared a proper petition, presented it to Your Honor and Your Honor ordered it filed. This petition was filed on behalf of all contract holders who purchased their contracts prior to March 10, 1939.

V

Thereafter and on March 8, 1946, your petitioners presented a motion to Your Honor to enroll the opinion and decrees of the Supreme Court upon Your Honor's minutes and for an order of reference in accord with such opinions and

decrees. This motion was properly ente
docket of this court and was granted in
Honor on a regular motion day, without
one. It will now be further necessary f
to attend to this case upon the referen
have a proper distribution of the trust f
with the mandate of the Supreme Court
processes of this Court as speedily as
of course, entail additional work and exp
your petitioners.

Your petitioners are also advised th
ceivers is still dissatisfied and is contem
tition for review in the Supreme Court o
Certainly, if this is done, it will require
half of your petitioners. However, this
tive at present, because the opinion of
of Tennessee expressly declines to stay
entertain a motion for a stay, and You
to proceed with the case forthwith.

VI

Petitioners work in this case has bee
the trust estate and all of such work w
formed. Your petitioners represented
to the fund whose sole interest was a
of the trust fund of approximately $2
tioners services were of value to the t
rectly resulted in the trust being admin
and legal manner. That petitioners did
Grant alone but did represent those m
held by both the Court of Appeals and
Petitioners are advised they are entit
for their services, to have this fee fix
amount by Your Honor, and to have it p
fund now in the hands of the Special Co
ever, it is impossible to determine at th
amount of the total fee to be paid your
of the matters set out above, their work
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continuously for nearly two years and

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t, more or less,
ve borne all of

their own expenses during that time. Therefore your petitioners believe that they are entitled at this time to be paid an advance upon their fee in a reasonable amount.

Premises Considered, Petitioners Pray:

1. That they be allowed to file this petition.

2. That they be paid a reasonable sum at this time, as an advance upon their counsel fees, for services rendered the trust estate, such sum to be not less than $10,000.

3. That they have general relief.

LEWIS S. POPE,
JORDAN STOKES, III,
WHITWORTH STOKES,
Petitioners.

We are security for
the costs of this cause,
not to exceed $250.00.
LEWIS S. POPE
WHITWORTH STOKES.

STATE OF TENNESSEE,
County of Davidson

Lewis S. Pope, Jordan Stokes III, and Whitworth Stokes make oath that they have read the foregoing petition and that the statements therein made are true to the best of their knowledge, information and belief.

Subscribed and sworn to before me this March 11, 1946.

A. P. OTTARSON, JR.,
D. C. and M.

ANSWER OF L. H. BROOKS, Trustee, et al., Filed March 16, 1946

IN PART I OF THE CHANCERY COURT FOR DAVIDSON COUNTY

Rule No. 57686

L. H. Brooks, Trustee, et al.,

vs.

Fidelity Assurance Association, et al.,

Answer of L. H. Brooks, Trustee, and R. L. Maloney, to the Petition of Lewis S. Pope and Others, for the Allowance of an Attorneys' Fee.

L. H. Brooks, Trustee, complainant, and R. L. Maloney, a contract holder whose claim has been heretofore allowed and is a party to this proceeding, for answer to so much and such parts of the petition of Lewis S. Pope, Jordan Stokes, III, and Whitworth Stokes, for the allowance of an attorney's fee as they are advised is material and necessary for them to answer, say:

They admit that petitioners represented H. E. Grant in the litigation in the Appellate Courts. Respondents believe that Jordan Stokes, III, represented another contract holder or filed a claim for another contract holder, but said contract holder was not an appellant and, therefore, respondents believe that petitioners did not represent said party in the litigation in the Appellate Courts.

Said petitioners, Lewis S. Pope, Jordan Stokes, III, and Whitworth Stokes, did not participate in the hearing before your Honor on the question of the basis of distribution of the fund, notwithstanding the fact that notice of the hearing was sent to all contract holders and presumably to the two contract holders represented by petitioner Jordan Stokes, III. After this Court had rendered its decree directing that the fund should be distributed to contract holders on the basis of the cash surrender values of their contracts, and after the Master had filed his report on the order of reference pursuant to said decree, H. E.

Grant, represented by petitioner Jordan Stokes, III, filed exceptions to said report and appealed from the ruling of the Master overruling said exceptions to the Chancellor, and then appealed from the decree of the Chancellor sustaining the decision of the Master disallowing his exceptions and from the decree of distribution.

The total amount of the claim of the said appellant, H. E. Grant was $210.00. A tender of the amount of said claim was made by the West Virginia Receivers of the Fidelity Assurance Association, as is evidenced by the records in this cause, and motion was made in the Court of Appeals to have judgment rendered for the amount of said claim, but the said appellant refused to accept payment of his claim and refused to have judgment rendered in his favor.

Respondents assume that the narrative of the proceedings in the Appellate Courts of this State is substantially as set forth in the petition. They will reserve the right to show all of the material facts with reference thereto in the event of a reference to hear proof in regard to said services.

Respondents deny that the services rendered by petitioners in this case have been for the benefit of the trust estate. They deny that any of such work was necessarily performed. They aver that the only party who could possibly have benefited from said services was the appellant H. E. Grant. The said H. E. Grant would have benefited from the acceptance of the payment of the full amount of his claim, but elected to carry on the litigation, even after tender of payment and offer to have judgment rendered therefor was made.

It has not yet been determined by this Court who, if any, parties will be entitled to participate in the distribution of the fund other than those claimants whose contracts had attained a cash surrender value and whose claims were specified and allowed in the former decree entered herein. The appellant H. E. Grant had not made sufficient payments on his two contracts to attain a cash surrender value when Fidelity Assurance Association went into receivership. He was in default in his payments when said receivership occurred. As is shown by the certified copy of the order of Honorable Stanley Reed, Justice of

the Supreme Court of the United States, made on March 13, 1946, and filed as a part of the record in this cause, the decree of the Supreme Court of the State of Tennessee is not now final. The execution of said decree has been stayed by the order of Justice Reed, pending decision of the Supreme Court of the United States in said case. This Court should make no allowance of compensation to petitioners for their services to appellant H. E. Grant, because:

(a) It is yet possible that the Supreme Court of the United States will hold that the decision of the Supreme Court of Tennessee concerning the basis of distribution of the fund is erroneous and will reverse the decree of the Supreme Court of Tennessee, and consequently neither H. E. Grant nor any other party other than those to whom said fund was adjudged to belong by the decree of this Court, will be entitled to receive any part of said fund.

(b) On the present state of the record in this cause, it cannot be determined by this Court that petitioners have rendered any services that have inured to the benefit of any parties in interest in the distribution of this trust estate.

(c) Petitioners have not protected nor preserved any fund. The fund for distribution was already in the hands of the Clerk & Master as Special Commissioner before any of the services rendered by petitioners, for which they seek compensation, were commenced.

(d) No allowance of cmopensation to petitioners for their services can be made except upon a finding and determination of the specific beneficiaries of the trust fund to whose benefit such services have inured, and the extent to which they benefited.

All other allegations in the petition not heretofore expressly admitted or denied, are here and now generally denied as fully as if separately and specifically denied.

J. G. Stephenson,
Farmer, Denney & Leftwich,
Attorneys for Respondents.

ANSWER OF H. ISAIAH SMITH, et al., Filed March 16, 1946

IN PART I OF THE CHANCERY COURT FOR DAVIDSON COUNTY

Rule No. 57686

L. H. Brooks, Trustee, et al.,

vs.

Fidelity Assurance Association, et al.,

Answer of H. Isaiah Smith and Arthur P. Hudson, Receivers of Fidelity Assurance Association, to the Petition of Lewis S. Pope and Others, for the Allowance of an Attorney's Fee.

H. Isaiah Smith and Arthur P. Hudson, Receivers of Fidelity Assurance Association, for answer to so much and such parts of the petition of Lewis S. Pope, Jordan Stokes, III, and Whitworth Stokes, for the allowance of an attorney's fee, as they are advised is material and necessary for them to answer, say:

I

Respondents admit that petitioners represented H. E. Grant and are unadvised as to the representation as to any other parties in litigation and hold petitioners to strict proof thereof.

Respondents deny that petitioners' work in this case has been for the benefit of the trust estate and that all such work was necessarily performed and that the petitioners represented all claimants to the fund whose sole interest was a correct distribution of the trust fund.

Respondents deny that petitioners' services were valuable to the trust estate and resulted in the trust fund being properly administered.

Respondents deny that petitioners represented any class or group of claimants to the trust fund.

II

Respondents further allege and state that petitioners represented solely H. E. Grant, a contract holder who had a purported claim for $210.00, for an amount allegedly paid in to Fidelity Assurance Association prior to April 11, 1941.

Respondents say that petitioners' client, H. E. Grant, actually had no claim against the trust fund and no claim against Fidelity Assurance Association for damages for breach of contract, because the said H. E. Grant violated, breached or broke his contract by failing to live up to the terms thereof prior to any subsequent breach by Fidelity.

III

The trust fund of approximately $236,000.00 was created and preserved and placed in the registry of this Court by the efforts of these respondents and the efforts of Messrs. Farmer, Denney & Leftwich, in the decision by the United States Supreme Court in the case of Fidelity v. Sims, 318 U. S. 608.

Respondents allege that they tendered Grant the full amount of his purported claim, because the amount of said claim was trivial and inconsequential, as compared to the interest of the other contract holders, and to avoid useless and needless litigation, which amount was rejected by the said Grant.

By reason of the stay granted by Justice of United States Supreme Court on March 13, 1946, the decision and judgment of the Supreme Court of Tennessee has not become final and the result of the litigation, which result will be urged most strongly by these respondents, may well be that H. E. Grant by his appeal did not represent a class and constitute a class action but solely on his own behalf, and that the action of the Supreme Court in setting aside this Court's decree of distribution as to all other contract holders is erroneous and will be set aside.

Therefore, respondents say that until determination of the litigation there is and can be no final decision that H. E. Grant by his counsel represented any class of contract holders.

IV

Respondents further state and allege that the claims of all contract holders of the class to which H. E. Grant belonged, that is those who had made payments to Fidelity Assurance Association prior to its insolvency but whose contracts had not achieved a cash surrender value, and who filed a claim in this Court within the time limit prescribed by the Court in its former decrees, amounted to, to-wit, $7,457.11.

These respondents and Messrs. Farmer, Denney & Leftwich have consistently throughout these proceedings and the litigation thereon represented the class of contract holders who had a cash surrender value to their contracts, and even under the decision of the Supreme Court of Tennessee those persons will receive, to-wit, 70% of their approved claims, and this has been through no efforts of petitioners, but on the contrary by petitioners' efforts and under the present decision of the Supreme Court of Tennessee, such contract holders are reduced from receiving 100% of the allowance of their claims to 70% allowance of their claims, and hence petitioners' efforts have been injurious to such contract holders as a class, not helpful, and no part of the fund to which such class of contract holders are entitled should be used to pay any attorneys' fees of the said petitioners.

V

Respondents allege that because of that which is above stated, petitioners' present claim for attorneys' fees is premature as no final determination has been made by reason of which the Court could properly allow attorneys' fees to be paid.

In the event the Court should determine that said petition is not filed prematurely, petitioners can only recover attorneys' fees for creating, protecting or preserving the fund of the class to which their client belonged, and that fund, as shown by the proofs of claim filed in this Court within the time limit permitted, amounts to not more than $7500.00, and this Court could allow only fees for such serv-

ices as would be proper and fitting to the protection or preservation of said $7500.00 and no further fees in any event, and should be paid out of said $7500.00, or such amounts as the claimants belonging to the same class as H. E. Grant would receive.

Respondents particularly allege that a general creditors' bill was brought by L. H. Brooks and others, through Farmer, Denney & Leftwich, their attorneys, and that this Court, by its proper decree of April 21, 1941, held the fund involved in this litigation to be a trust fund and that, therefore, the said L. H. Brooks, et al., as class representatives, performed every and all necessary services for the protection of said fund and for the benefit of all contract holders, except such contract holders as H. E. Grant and others of that class, and no efforts on behalf of petitioners were expended or should be paid for with respect to any part of the fund other than that part covered by the claims of the class to which H. E. Grant belongs.

All other allegations in the petition not heretofore expressly admitted or denied are here and now generally denied as fully as if separately and specifically denied.

KOONTZ & KOONTZ,
By, J. CAMPBELL PALMER, III,
Solicitors for H. Isaiah Smith and Arthur P. Hudson, Receivers of Fidelity Assurance Association.

DECREE OF APRIL 11, 1946 M. B. 158 P. 68

IN CHANCERY, PART I, AT NASHVILLE

Rule No. 57686

L. H. BROOKS, *Trustee, et al.*,

vs.

THE FIDELITY ASSURANCE ASSOCIATION, *et al.*

DECREE

This cause came on to be heard before the Honorable Thomas A. Shriver, Chancellor, upon the petition of Lewis S. Pope, Jordan Stokes, III and Whitworth Stokes, for an advance upon their fee; the answers thereto filed on behalf of L. H. Brooks, Trustee, et al., and the domiciliary receivers of the Fidelity Assurance Association; briefs and argument of counsel; and, from all of which it appearing to the Court that the petition should be sustained and an advance paid to counsel, at this time;

It is, accordingly, ordered, adjudged and decreed by the Court that Lewis S. Pope, Jordan Stokes, III, and Whitworth Stokes, be paid the sum of Three Thousand ($3,000) Dollars as an advance upon their fee in this cause, and J. C. Dale, Jr., Clerk & Master, as Special Commissioner, is hereby ordered to pay the said advance to counsel named above out of the funds in his hands in this cause.

All other matters are reserved.

O.K. for entry: Lewis S. Pope, Jordan Stokes, III,
J. Whitworth Stokes, Farmer, Denney & Leftwich.

STATE OF TENNESSEE,
County of Davidson:

I, J. C. Dale, Jr., Clerk and Master of the Chancery Court, at Nashville, do hereby certify that the foregoing is a full, true and perfect copy of the following papers in the cause wherein L. H. Brooks, trustee, et al., are Complainants, and The Fidelity Assurance Association, et al., are De-

fendants, as the same appear of record and now on file in my office:

Motion of March 8, 1946, copied from Motion Docket
Decree of April 17, 1946
Petition of Lewis S. Pope, et al
Answer of L. H. Brooks, Trustee, et al
Answer of Isaiah Smith, et al
Decree of April 11, 1946.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the Courthouse at Nashville, this the 30th day of April, 1946, and the 170th year of American Independence.

[SEAL.] J. C. DALE, JR.,
Clerk & Master.

OPINION OF TRIAL COURT IN WISCONSIN OF FEBRUARY 10, 1945

Formal Parts Omitted

The issue tried and now to be determined by this Court is whether "the proper basis for distribution of the Wisconsin deposit assets shall be the amount paid in by contract holders plus interest at the rate of six percent to the date of the receivership April 11, 1941" (more particularly set forth in paragraph 3 of this Court's preliminary order dated April 3, 1944); or the net cash surrender value of the contracts as of the date of receivership without interest thereon. (See stipulation dated July 18, 1944, page 5, paragraph 7.)

The question is not one without difficulty of determination. The fact that the record discloses that there will remain in excess of the cash surrender value a sum of approximately $330,000 (see affidavit of Emmett G. Hampton dated July 24, 1944) complicates the situation. If this excess were to be turned over to the West Virginia receivers to be applied by them in making payments to contract-holders everywhere on a cash surrender basis, this Court is inclined to agree with the contention of the Banking Commission that there is very little likelihood of any of it finding its way back to Wisconsin contract-holders.

The duty imposed upon this Court is to administer this fund so as to protect the contract-holders of Wisconsin to the fullest and still remain within and meet the requirements of law. That likewise is a duty that is imposed upon the Banking Commission of Wisconsin. No doubt it was that spirit or obligation that prompted the Commission to prepare and this Court to sign the preliminary order of distribution dated April 3, 1944.

This Court, of course, need not be hemmed in by being required to follow in toto either one of the foregoing contentions, if there be another order that would be more reasonable, just, equitable and lawful for it to make.

This Court has been furnished with very able briefs on both sides of this question. The Court has carefully examined all the records, files and proceedings and reviewed the evidence in this action as well as the briefs submitted, and has concluded that that part of the preliminary order of April 3, 1944 contained in paragraph 3 should not be approved. The Court feels that a long opinion analyzing the contentions of the two theories would serve no useful purpose, but will briefly set forth a few of the more important reasons for its conclusion.

Under the preliminary order 635 contract-holders would be required to take less than the cash surrender value of their contracts (see affidavit of Emmett C. Hampton, July 24, 1944), while we are advised by the same Liquidator that only approximately 400 contract-holders whose contracts were current at the time of receivership (April 11, 1941) but who had not attained a cash surrender value would be benefited.

The above mentioned 635 contract-holders whose contracts had a cash surrender value had a definite fixed amount at the time of the receivership they could have demanded and the Association would have had to pay; they had definite ripened contracts. It would seem to this Court that it would be unlawful and illegal to require them to take less, when there are sufficient funds to pay them in full on a cash surrender basis. In order to do this the Court would be breaking and making a new contract.

Moreover, the fund in question is clearly a trust fund. Since the adoption of Section 215.395 of the Wisconsin

Statutes this fund has been earmarked on a cash surrender basis. Testimony at the trial definitely disclosed that since that time the Banking Commission in applying the law held that the deposit required by Section 215.38 and 215.39 was measured by the cash surrender value of contracts outstanding. The same standard of liability was applied by the West Virginia authorities. In fact, this standard was the extent of the Association's liability as long as it was a going concern. Under this set-up there was always a fixed standard for prescribing the amount of the required fund, for identifying the claimants to the fund, and for establishing the amount of the claim of each beneficiary to the fund.

Certainly, under the statutes above quoted and the practice adopted by the Banking Commission, the fund to be now distributed was not based upon the amount of money paid in by Wisconsin contract-holders. No association could operate, if required to deposit with the State the entire amount of money paid in to it; there would be no capital to do business, and such regulations would be prohibitive and no doubt unlawful.

The fund in question is earmarked or partakes of the character of a trust fund for the benefit of certain definitely ascertainable persons. Nor does insolvency change the character of the deposit. *Lewis* v. *American Savings & Loan Association*, 98 Wis. 203, page 228. Likewise it would seem that the class of beneficiaries or *cestuis que trustent* cannot be enlarged or diminished because of insolvency.

Nor does the pay-in method with six per cent interest thereon appeal to the equity side of the Court. To require 635 of the oldest contract-holders, who have paid consistently for a long period of time and who have augmented the trust fund by the greatest amount, to take less than the cash surrender value of their contracts, in order to give to a class of 400 contract-holders whose contracts have no value but who merely have some intangible or inchoate claim against the Association in case of insolvency, would seem most inequitable; and in doing so to allow six per cent interest on such intangible claims, more than the amount they would receive if they were permitted to perform their contracts,—and all at the expense of claimants who have a defi-

nite fixed value—would seem to this Court shockingly unjust.

The Court is of the opinion that if it had not been for the excess in the fund over the cash surrender value, no effort would have been made now to have the fund distributed on the basis of money paid in. The Banking Commission and this Court have previously recognized the cash surrender basis as a sound method of distribution when it made its order of partial distribution dated October 15, 1943. In other states where the question has previously been presented, the matter has been resolved by the courts in favor of the cash surrender method.

Nor has this Court been able to determine upon any other method of distribution of this fund that would be just and equitable and easy of administration. All others are fraught with difficulties, apparent injustices and inequities, and of doubtful validity.

Accordingly, that part of the preliminary order made by this Court on April 3, 1944, in paragraph 3, is withdrawn, and the attorney for the Banking Commission may draw a new and permanent order in accordance with his opinion, submitting the same to all counsel who appeared in this action before presenting it to this Court for signature.

If any of the parties are desirous of appealing, such intention should be made known to this Court within ten days from the date of this opinion. It is the desire and hope of this Court that this fund be distributed forthwith to the contract-holders on the cash surrender basis.

The question of whether interest is to be allowed is left for future determination. This is in accordance with the stipulation made relative to the trial of the issues. Although the matter was briefed by the attorney for the Banking Commission, the attorney for the West Virginia receivers did not brief the question. The Court will therefore permit briefs to be filed on this subject, and they must be in the hands of the Court within thirty days. This determination on the question of interest should not in any way interfere with the immediate payment of the principal amount.